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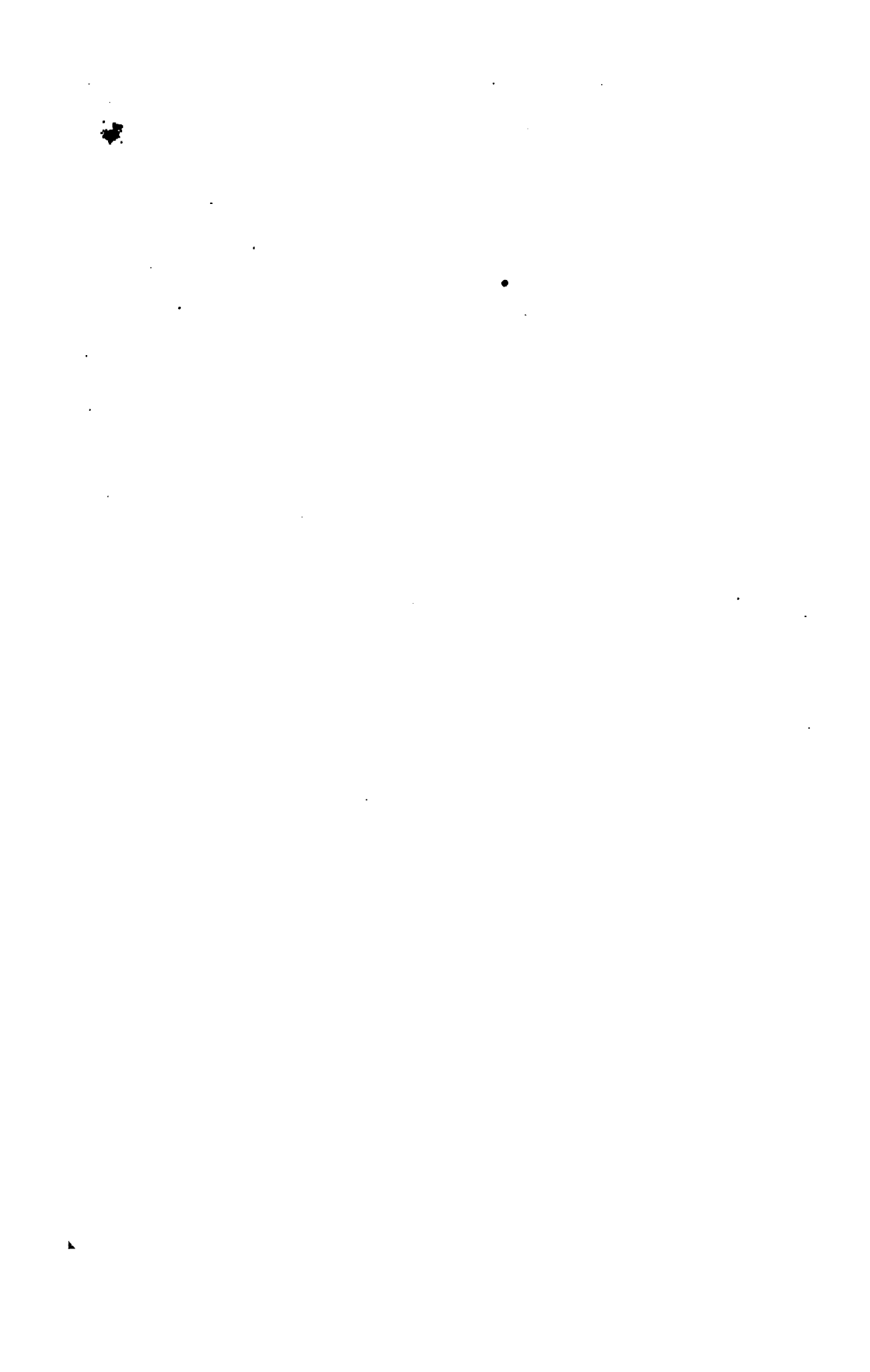
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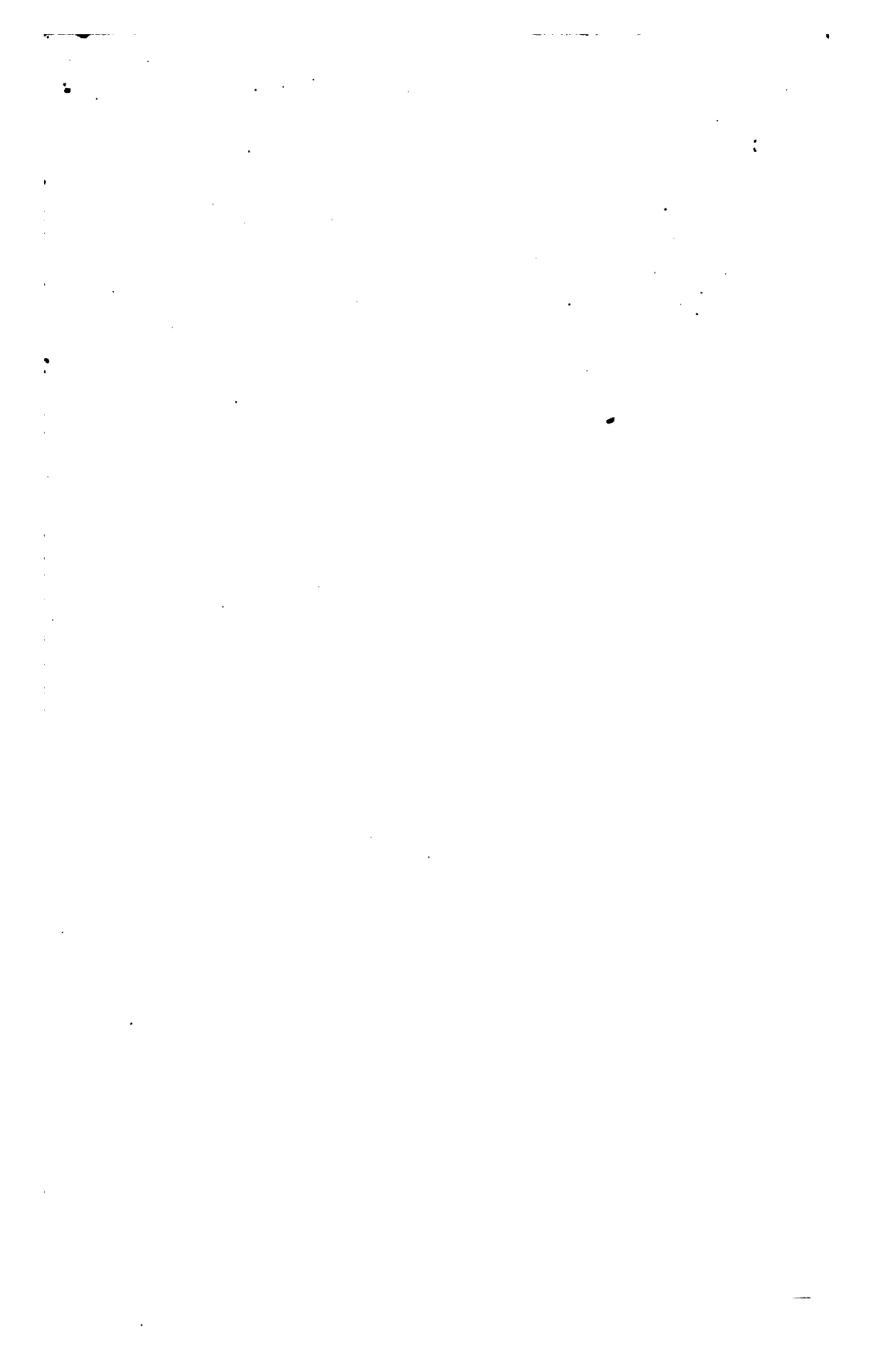
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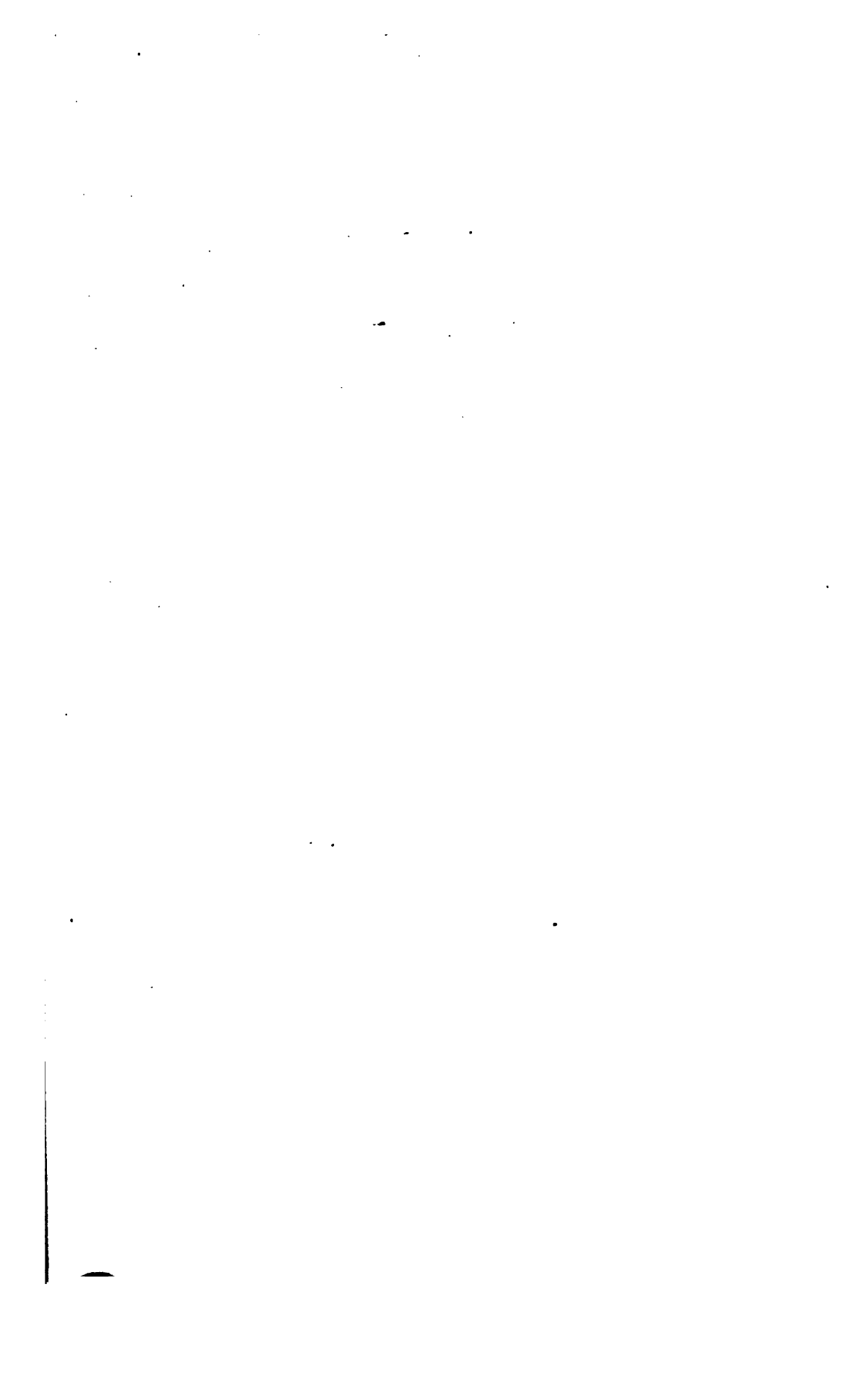
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REPORTS OF CASES

ARGUED AND DETERMINED

IN

The King's Bench Practice Court;

WITH THE

POINTS OF PRACTICE

DECIDED IN THE COURTS OF

Common Pleas and Exchequer,

FROM

MICH. TERM, 1830, TO HIL. TERM, 1833.

BY

ALFRED S. DOWLING, ESQ.

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1830.

SMITH'S
Bail.

Justice *James Parke* to have been formed by all the Judges, on deliberation, not to permit others than housekeepers or freeholders to justify as bail (a).

BAYLEY, J., rejected the bail.

(a) As to the competency of bail, not housekeepers or freeholders, to justify in respect of *long leases*, a difference of practice existed among the Judges of the *King's Bench*. Thus bail, mere householders, have been ruled by *Bayley, J.*, to be sufficient, and by *Littleton, J.*, insufficient. *Colson's* bail was rejected by *Parke, J.*, in *Michaelmas* Term, 1829, on the ground that they were not housekeepers or freeholders, although they held long leases; however, on hearing that a difference existed in the practice of the Judges, he pro-

mised to consult them on the subject. On a subsequent day in the term his Lordship informed the bar, that it had never been the practice of the other Courts to let persons, not freeholders or householders, justify in respect of long leases; that it was expedient that the practice of all the Courts should conform; and that the Judges, on conference, had determined, that, for the future, persons not householders or freeholders should not justify in respect of leases.

Nov. 11th.

DENTON and Others, *Bail*.

In an action against several, it is no objection to the notice of justification that it states, that the bail will justify for three, bail for two only having been put in.

IN an action against four defendants for aailable amount, two were arrested. They put in bail; but the notice of justification stated, that they would justify for three of the defendants.

PARKE, J.—The notice was good. When the bail come into Court they may decline justifying for the third defendant.

1830.

ANONYMOUS.

Nov. 14th.

ARCHBOLD moved for a rule to shew cause why the bail bond should not be delivered up to be cancelled, on the defendant's filing common bail. The defendant is an attorney of the *King's Bench*, and having been arrested on process issuing out of the *Common Pleas* he has given a bail bond to the Sheriff. My application is, that the Court will oblige the Sheriff, who is an officer of all the Courts, to deliver up the bail bond to be cancelled. The bail bond is not a proceeding in the Court of *Common Pleas*. It is not intitled in any Court, but is given to the Sheriff himself. In the case of *Snee v. Humphreys* (a), an attorney of the *Common Pleas* had been arrested on a *latitat*, and an application was made to set aside the proceedings, on the ground that he ought to have been sued by bill in the *Common Pleas*. But, *per Curiam*, "You must sue out your writ of privilege; for, if you are an attorney of the *Common Pleas*, and are *rectus in curia* there, you will have it of course, and may plead it here." There, the application was not to have the bail bond delivered up to be cancelled, but to set aside proceedings in another Court, carried on by the officers of that Court, and therefore distinguishable from the present, which is only against the Sheriff, who is an officer of all the Courts.

Where an attorney of the *King's Bench* has been arrested on process issuing out of the *Common Pleas*, the *King's Bench* will relieve him summarily.

LITLEDALE, J.—This case may be considered with reference to the attorney, and with reference to the Sheriff. An attorney of this Court ought certainly to be relieved if he is arrested on process issuing out of this Court. But here he is arrested on process issuing out of the *Common Pleas*. We therefore have no jurisdiction to interfere.

(a) 1 Wils. 306.

1830.

ANONYMOUS.

There is a mode by which he may obtain relief in the *Common Pleas*. It is true, that remedy is more dilatory than the one now sought to be applied; but I think he must be left to his remedy there. Then, as the application concerns the Sheriff, it is true that he is the officer of all the Courts; that is to say, any one of the Courts may employ him to execute its process; but, when a Court has employed him to execute its process, he is the officer of that Court, only so far as he is employed to execute its process. Therefore, having in this case been employed to execute the process of the *Common Pleas*, he is, so far as that Court is concerned, the officer of the *Common Pleas* only. The *Common Pleas* only, therefore, has a right to exercise any jurisdiction over him.

Rule refused.

Nov. 14th.

ANONYMOUS.

If the Crown demises during a term, a declaration in ejectment may be intitled as of the first year of the successor's reign.

ON a motion for judgment against the casual ejector, the declaration was intitled of *Trinity* Term, in the first year of the reign of *Will. 4*, the death of *Geo. 4*, having taken place in that term.

LITLEDALE, J., held the declaration properly intitled.

Rule granted.

Nov. 19th.

DOE d. SANDERS and Another v. ROE.

In ejectment by landlord against tenant, if the title to the premises be disputed between

them, the latter is not compellable to give the undertaking and enter into the recognizance required by 1 *Geo. 4*, c. 87, s. 1.

RICHARDS obtained a rule to shew cause, why the tenant in possession, *John Barton*, should not, on the usual

terms, give the undertaking, and enter into the recognizance required by the 1 *Geo.* 4, c. 87, s. 1, in actions of ejectment brought by landlords against their tenants.

1830
 Doe
d.
 SANDERS
v.
 Roe.

Hutchinson shewed cause.—The affidavit of *Barton*, the tenant in possession, states, that he holds the premises in question as heir-at-law. It is true, he took an assignment from a sub-lessee of the remainder of the lease originally granted by the ancestor of the lessors of the plaintiff, but he did so only to prevent the premises from being dilapidated. Ever since the expiration of that term, he has held and still holds as heir-at-law.

LITLEDALE, J.—I do not think that this case comes within the statute. The tenant in possession swears he holds as heir-at-law. There is a dispute, therefore, as to the title. The statute was intended to apply to cases where the title of the landlord was clear.

Rule discharged.

ANONYMOUS.

Nov. 20th.

V. RICHARDS shewed cause against a rule for delivering up the bail bond to be cancelled on filing common bail. The ground of the application was an alleged defect in the affidavit to hold to bail. It was for money due on an award, which directed the payment of 25*l.* within a month after demand. It did not go on to state that the money was payable “at a day now past.” He admitted, that in actions on promissory notes and bills of exchange, it was usual to make such an allegation. In actions on awards, however, he conceived it was otherwise. It was also said, that the award ought to have been set out, so as to shew

An affidavit of debt on an award ought to state the fact of the submission to, and the making of the award, and that the money was due at a day now past.

1830.
 ANONYMOUS.

how the money became due. If that were so, the award must be set out at full length.

Kelly, contra, submitted that it was not necessary to set out the award at length. It is only requisite that sufficient should appear on the affidavit, to shew that the award was made on such a submission as would bind the parties, and that it had been duly made. But it is clearly necessary that the money should be stated to be payable on the award "at a day now past." If not, the money would not appear to be due. He cited *Driver v. Hood* (a).

PARKE, J., referred to *Tidd's Forms* (b), in which was an affidavit to hold to bail for money due on an award made under an order of *Nisi Prius*, which stated the debt to be due "at a certain day now past." That form also states the submission by consent of the parties, and the making of the award. On the affidavit in the present case, supposing it to be false, the party making it could not be convicted of perjury, because it would be answered, that it was *debitum in præsenti solvendum in futuro*. The present rule must, therefore, be made absolute.

Rule absolute.

(a) 7 B. & C. 494.

(b) Cap. 10, sec. 78, p. 82, 9th edit.

Nov. 20th.

Ex parte Moxon.

Where an attorney has drawn his own marriage settlement, under which he takes no interest, but is mentioned in it, and it is deposited with him for safety, the Court will not compel him to give it up at the instance of a trustee under it.

J. WILLIAMS moved for a rule to shew cause why Mr. *George Pyne Andrews* should not deliver up to Mr. *John*

Dowell Moxon, or Mr. *William Wasbrough*, his attorney, certain indentures of lease and release, and settlement, and other papers relating to the property mentioned in the said indentures. The facts are these—Mr. *Andrews*, who is an attorney, and against whom the present application is made, married, in 1805, one *Mary Wasbrough*, since deceased. The marriage settlement was prepared by him, and, for safety, lodged in his hands. By it, certain property was limited to the use of the wife, after her to the use of the children of the marriage, under certain restrictions; and, in case of only one child being born, or surviving, then to his or her sole use, &c. The wife died, and the only surviving child, who was a son, attained the age of twenty-one. Mr. *Moxon*, the present applicant, and the surviving trustee under the marriage settlement, was desirous of discharging himself from the trusts thus confided in him; and, therefore, applied to Mr. *Andrews* to deliver up the settlement. This he refused to do; and, therefore, the present application is made for the summary interference of this Court, to compel him, by the jurisdiction it has over its officers, to deliver it up; Mr. *Andrews* having prepared the settlement in his professional character, and taking no interest under it. He cited *The Matter of the Executors of Aitkin, deceased* (a).

1880.
Ex parte
Moxon.

LITLEDALE, J.—This is a very different application from that usually made against attornies. Mr. *Andrews* was a party named in the settlement, and, after this lapse of time, the Court cannot interpose.

Rule refused.

(a) 4 Barn. & Ald. 47.

1830.

Nov. 23rd.

HALL v. BARBER.

Where a married woman has held herself out as a widow, and by that means obtained credit, and she is afterwards arrested, the Court will not relieve her summarily.

HUMFREY shewed cause against a rule for cancelling the bail bond on filing common bail, on the ground of the defendant being a married woman. The plaintiff swore, in answer to the application, that she did not know, at the time of the debt being contracted, that the defendant was a married woman; on the contrary, so far as the representation of the latter would lead, she had every reason for believing she was a widow: for, the defendant came to the house of the plaintiff, who kept a school, and, after expressing a desire to send her daughter to the plaintiff's establishment, in order to induce the taking of her daughter on lower terms, represented herself as a widow, and in great distress. He cited *Partridge v. Clarke* (a), *Richardson v. Brown* (b).

Hutchinson, contra, contended, that as the plaintiff did not swear she was unacquainted with the fact of the defendant's marriage at the time of the arrest, the latter was entitled to her discharge. He cited *Waters v. Smith* (c).

LITLEDAL, J.—As the defendant held herself out as a widow, and by that means obtained credit from the plaintiff, she is not entitled to relief in this summary way, but must be left to her plea of coverture.

Rule discharged.

(a) 5 T. R. 194.

(b) 1 Bing. 344.

(c) 6 T. R. 451.

PHILLIPS v. WELLESLEY.

Nov. 20th.

BARSTOW shewed cause against a rule, calling on the plaintiff to shew cause why an *exoneretur* should not be entered on the bail piece. The ground of the application was, that the defendant had become a member of Parliament for the borough of *St. Ives*, between the perfecting of bail and obtaining final judgment. The facts were these:—An action, at the suit of the plaintiff, had been brought against the defendant for 3,000*l.*, and he was accordingly for that amount arrested. Special bail was perfected. The defendant pleaded the statute of limitations, and the cause was set down for trial for the Sittings after *Easter Term*. An application to settle the action was then made to the plaintiff. The defendant, by the consent of his bail, gave a *cognovit* for the debt and costs. On the 28th of *August*, the defendant was elected a member of Parliament for the borough of *St. Ives*. Judgment on the *cognovit* was entered up, and proceedings taken against the goods of the defendant.

The present application was made by the bail to free themselves from the liability they had incurred by entering into their recognizances. He should submit two propositions to the Court: *first*, that it was discretionary in the Court whether they would grant the application or not; and *secondly*, that this was one of those cases in which the Court ought in its discretion to refuse it.

There were two classes of cases, which he should consider under the first proposition—*first*, those where a defendant was arrested at the time he was in Parliament; *secondly*, those where he was in actual custody when he was elected member of Parliament.

Now, as to the first class, the Courts in the earlier cases appeared to have declined interfering, but left the party to his writ of privilege. Afterwards, they had inter-

An unprivileged person in custody in execution, elected a member of Parliament, is entitled to his discharge on motion; and, therefore, bail may have an *exoneretur* entered on the bail piece, if the privileged person be elected between perfecting bail and final judgment.

2. And this was allowed, although a *cognovit* had been given with the express consent of the bail; and the plaintiff, had he not taken the *cognovit*, might have compelled a render before the defendant acquired privilege.

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ferred; and he would concede, that if the defendant had been a member of Parliament at the time of this arrest, the Court would at once discharge him (a). In the last case on the subject, however, *Chester v. Upsdale* (b), the Court expressly observed, that it was discretionary in it whether they would grant the application or not.

With respect to the second class of cases, there was not one in which the Court had interfered to discharge a defendant in actual custody, who had been elected a member of Parliament. The course had been for the Speaker to issue his warrant to the gaoler having the defendant in custody.

PARKE, J.—There was the case of Mr. *Burton*, who, while in actual custody, was elected a member for the borough of *Beverley*.

Barstow.—There, this Court did not interfere. That case was heard at chambers, and the application being refused, the Speaker issued his warrant to the Marshal, and, in obedience to that warrant, he was discharged. The gaoler would be bound to keep him in custody until he received an order from a competent authority for his discharge. He would be guilty of no breach of privilege of the House of Commons by detaining the defendant; for, if he should, the Sheriff's return, that the defendant was elected, would be sufficient to entitle him to his discharge; but no case, no *dictum*, had gone so great a length as this. Now, the situation of the bail was analogous to that of the gaoler. The defendant was not in the actual custody of the bail, but he was in their legal custody. If, then, the Court would not interfere with the gaoler, why should it interfere with the bail. He should contend that it was

(a) *Executors of Skewys v. Chamond*, 1 Dyer, 60 a; *Pitt*, 2 Strange, 985; Com. 444.
 (b) 1 Wilson, 278.

an incontrovertible proposition, that an *exoneretur* cannot be entered on the bail piece, unless it be quite clear that the principal would be discharged out of the custody of the Court. Against this proposition, at first sight, appeared to be the case of *Trinder v. Shirley* (a). That was an application on the part of the bail that an *exoneretur* might be entered on the bail piece, on the ground of the defendant having become a Peer, and it was therefore no longer in the power of the bail to surrender him. In that case, the counsel for the plaintiff declared, that he could not shew any cause against the rule; upon which it was made absolute. No discussion took place, but the matter passed, without any consideration of the question. In that case it was assumed by the defendant's counsel, that the bail could not render him. Why could they not render him? When a man was delivered to his bail, he was as much in their custody, in point of law, as if he were in the custody of the Marshal. He might, in case of escape, be retaken, even on a *Sunday*. If he were in their custody, how would they be guilty of any breach of the privilege of Parliament, by transferring him from their own custody to that of the officer of the Court? But the present question is, whether they are legally discharged. There was the case of *Langridge v. Flood* (b), mentioned by Mr. Tidd. He had not been able to find a report of that case any where, although he had searched for it very carefully. The Court was, therefore, unacquainted with what passed on that occasion. It did not appear whether it passed *sub silentio*, as in *Trinder v. Shirley*. Nor did it appear in what state the case was; whether it was in a state of pressure against the bail.

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PARKE, J.—That makes no difference.

(a) Douglas, 45. (b) 1 Tidd, 290, 9th edit., cited in 4 East, 190.

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Barstow apprehended that it did make a difference. Here the bail were not pressed for payment, but proceedings were now in progress against the defendant's goods; the bail might still try the question, whether a man having no privilege of Parliament at the time of his arrest, and afterwards becoming privileged, is entitled to avail himself of it, without the Court interfering on motion. Now, supposing a man having no privilege to be arrested, and then to be elected, and, in order to be set at liberty, to remain in Parliament one day and then vacate his seat, could it be said that it would be a good plea for the bail, that their principal had obtained this temporary privilege in the intermediate time?

PARKE, J.—Perhaps it would not be a good plea.

Barstow.—Then, if it would not in such a case be a good plea, how could they avail themselves of it here?

PARKE, J.—But bankruptcy or insolvency might be pleaded.

Barstow.—Certainly, for there the defendant's person is absolutely discharged; and the Court are expressly directed by act of Parliament to liberate the parties, if they are arrested after their discharge. But the case of a member of Parliament is quite different. The party is not absolutely discharged by becoming a member of Parliament; his liability is only interrupted or suspended while he is a member of Parliament. This was probably the case at common law, but all doubt upon that point has been removed in a declaratory statute (a). In the case of a peer, too, a party is absolutely discharged from his liability to arrest. The case, therefore, is, in this respect, distinguish-

(a) 1 Jac. 1, c. 13; 1 Chit. Stat. 313.

able from the case in *Douglas*, even if that case had undergone discussion in Court, which it did not. From these observations, it may be safely inferred, that the interference of the Court is perfectly discretionary.

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This brought him to the second branch of his argument, which was, that this was not a case in which the discretion of the Court would be exercised to afford relief to the bail. He would call the attention of the Court to the proceedings in the cause. The cause was set down for trial at the Sittings after *Easter* Term. It was proposed that the parties should come to terms; and the defendant, by the consent of his bail, gave a *cognovit*. Promises were made that money was raising for the payment of Mr. *Wellesley's* debts. Nothing having been paid, application was made to his attorney, and the answer was, that he had been obliged to apply the money to other purposes. Since that period, the defendant had expended in a fruitless election more than would suffice to pay the debt due to the plaintiff. This was the conduct of the defendant. The *cognovit* had been given by consent of the bail. The terms of their consent were these:—"We, the bail in this cause, do consent to the above *cognovit*, and that our recognizance shall remain in force as if the plaintiff had obtained judgment by verdict in the ordinary course of proceedings in this cause." Now, by "the ordinary course of proceedings," the plaintiff would have been able to compel a render in *Trinity* Term. The defendant would then have had no privilege of Parliament, and would then have been put to the alternative of going to gaol or paying the money. He would have preferred the latter. The bail, by interfering, had thus prevented the plaintiff from obtaining payment. In addition to this, the defendant had admitted that he has given security to his attorney for 5000*l.* to indemnify the bail. He concluded by submitting—*first*, that it was doubtful whether the bail were discharged in point of law or not;—*secondly*,

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whether or not the interference of the Court was discretionary;—*thirdly*, this was a case in which the discretion of the Court would induce it to leave the bail to their legal rights, and not assist them on motion.

Comyn, in support of the rule, submitted, that the Court would not put the bail to the peril of attempting to render their principal, when he was a member of Parliament. He was stopped by the Court.

PARKE, J.—I am clearly of opinion myself, that the bail are entitled to be discharged on motion. But, as the application is a matter of some consequence, I will speak to the other Judges; and if they think the rule ought not to be made absolute, it will be intimated to-morrow morning. If no such intimation be given, the rule will be drawn up for entering the *exoneretur* on the bail piece. It will be understood, that the bail are entitled to be relieved, where the principal, if surrendered, would be entitled to relief. The question here is, therefore, would the defendant have been entitled to be discharged, if in custody, after final judgment. In my opinion he would. In the case of Mr. *Burton*, who was elected member for *Beverley*, I was counsel. It came on before Mr. Justice *Bayley*, at chambers; and on some old authority being produced, he doubted whether the defendant was entitled to his discharge, he having been elected member of Parliament while in custody after final judgment. But the warrant of the Speaker put an end to that doubt. On searching the precedents of the House, it was found, that a person in custody after final judgment, being elected a member of Parliament, was entitled to his discharge. The rule must, therefore, be made absolute.

Rule absolute.

No further notice was taken of the case by the learned

Judge who presided in this Court the next day, and, therefore, the judgment of *Parke, J.*, may be assumed to be confirmed by the other four Judges.

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DOE *d.* UPTON *v.* BENSON.

Nov. 23rd.

LEE moved for a rule to shew cause why a defendant should not be discharged out of the custody of the Sheriff of *Yorkshire* under the 48 *Geo. 3*, c. 123, he having remained twelve successive calendar months in custody, on an attachment for non-payment of costs, there not being a debt due exceeding the sum of 20*l.*, exclusive of costs.

A defendant in custody on an attachment for non-payment of costs under 20*l.* more than twelve months, is not entitled to his discharge under the 48 *Geo. 3*, c. 123.

Scotland shewed cause in the first instance.—The case of a defendant in custody on an attachment was not within the statute, if the defendant was in custody for a debt exceeding 20*l.*, and, therefore, not entitled to his discharge. He cited *R. v. Hubbard* (a), *R. v. Charles Dunne* (b), *R. v. Edward Clifford* (c).

LITLEDALE, J.—The defendant is not entitled to his discharge, as the case of a defendant in custody on an attachment is not within the 48 *Geo. 3*, c. 123.

Rule refused.

(a) 11 East, 408.

(b) 2 M. & S. 201.

(c) 8 D. & R. 58.

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Nov. 23rd.

SIMON and Others, Assignees of ROGERS, v. WINNINGTON.

If a married woman represents herself as single, and by that means obtains credit, if arrested, she is not entitled to her discharge on motion.

LEE shewed cause against a rule for cancelling the bail-bond on filing common bail, on the ground that the defendant had been arrested on a promissory note given by her when a married woman. The defendant had gone to the bankrupt, of whom the plaintiffs were assignees, and told him that she was a married woman, but she was about to be divorced. She had some time afterwards gone again, and producing a piece of parchment, which she declared to be an act of Parliament divorcing her from her husband, and empowering her to marry a banker in *Pall Mall*, ordered some clothes for her wedding. A few days after, she gave a promissory note for the amount, and on this instrument she was arrested. As she had represented herself at the time of obtaining credit to be unmarried, she must be left to her plea, and could not be relieved on motion.

Follett, in support of the rule, submitted, that as it was not negatived by the bankrupt that he knew that she was a married woman at the time the note was given, the defendant was entitled to be discharged. If the arrest had been for goods and not on the note, it would have been different.

LITLEDALE, J.—The defendant ought not to be discharged, as she clearly obtained credit by a fraudulent representation of her circumstances.

Rule discharged, with costs.

BURN *v.* PASMORE.

1830.

Nov. 24th.

COLTMAN shewed cause against a rule obtained by *V.*

Richards, calling on the plaintiff to shew cause why a suggestion should not be entered on the roll, to deprive him of his costs, under the *London Court of Conscience Act*, 39 & 40 *Geo.* 3, c. 104, s. 12, on the ground of a sum not exceeding 5*l.* having been recovered by the plaintiff in an action brought in this Court. The plaintiff and defendant were attornies of the Court of *King's Bench*. The debt arose within the jurisdiction of the *London Court of Conscience Act*, and the sum recovered was 5*l.* In *Board v. Parker* (*a*) it had been decided, that attorneys, *plaintiffs*, are not within the *London Court of Conscience Act*, and therefore not compellable to sue there for a debt not exceeding 5*l.*, at the peril of costs. He might sue by attachment, therefore, though the debt be less than 5*l.*, and arose within the jurisdiction of that act. It would perhaps be contended that an attorney might waive his privilege, and then he would be in the same situation as any other person, and therefore without privilege (*b*); and that here he had done so in proceeding by bill. But how could it be said that he had waived his privilege, since the law forced him to proceed in a case of this description by bill, and not by attachment of privilege? He cited *Ratcliffe v. Besley* (*c*), *Barber v. Palmer* (*d*), *Pearson v. Henson* (*e*), *Lunn v. Ascough* (*f*), *Thomson v. Kash* (*g*). He *must* proceed by bill. Not having waived his privilege, he was in full possession of it, and therefore not within the *London Court of Conscience Act*.

An attorney plaintiff suing an attorney defendant for a cause of action not exceeding 5*l.*, arising within the jurisdiction of the *London Court of Conscience Act*, 39 & 40 *Geo.* 3, c. 104, is not entitled to his costs.

(*a*) 7 East, 47.

(*b*) *Hetherington v. Lowth*, 2 Str. 837; *Parker, One &c., v. Vaughan and Others*, 2 B. & P. 29.

(*c*) 2 Str. 1141.

(*d*) 6 T. R. 524.

(*e*) 4 D. & R. 73.

(*f*) *Barnes*, 43.

(*g*) *Barnes*, 44.

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v.
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V. Richards, in support of the rule, contended, that it was of no consequence whether the plaintiff waived his privilege of his own accord, or was forced so to do by the rule of law. It was sufficient, that he had sued, not as an attorney, to bring him within the operation of the Court of Conscience Act. By so doing, no matter from what cause, he had virtually waived his privilege.

Cur. adv. vult.

Nov. 29th.

LITLEDALE, J.—I have consulted the other Judges on this point, and they agree with me in thinking that this rule ought to be made absolute. If neither the plaintiff nor the defendant were attorneys, the debt would be recoverable in the Court of Conscience; and if the plaintiff had sued in the superior Court, he would have been deprived of costs by the act. But if the plaintiff does not proceed by attachment of privilege, he sues as a common person, and is not entitled to the privileges of an attorney. So, also, if the privilege be lost, the plaintiff must be considered as a common person. It therefore appears to me that this rule must be made absolute, but without costs.

Rule absolute, without costs.

Nov. 25th

ANONYMOUS.

It is no objection to a declaration in ejectment, not brought by a

landlord against his tenant, that the notice directed by the 11 Geo. 4 & 1 W. 4, c. 70, s. 36, is subscribed, provided it is served before the essoign day (a).

BY the 11 Geo. 4 & 1 Will. 4, c. 70, s. 36, landlords, when their title accrues in or after *Hilary* or *Trinity*

(a) Now, by Reg. Gen. T. T. full term, the decision would be 1831, R. 11, if the declaration the same. See Chitty's Practice, were served before the first day in 297.

Terms, are allowed to serve a declaration in ejectment on their tenants, to which is to be subscribed a notice to appear and plead in ten days (*a*).

1830.
ANONYMOUS.

On a motion for judgment against the casual ejector, it appeared, that an attorney in the country, supposing the section in question applied to all actions in ejectment, had subscribed his declaration in a common ejectment in this special manner, and it was served before the essoign day.

LITLEDALE, J., held this no irregularity.

Rule granted.

(*a*) *Vide* 1 Dowling's Statutes, 388.

— *v. WHITE.*

Nov. 29th.

PLATT opposed an application for discharging a defendant out of custody under the 48 *Geo.* 3, c. 123, on the ground of his having remained in execution above twelve successive calendar months, on a judgment for a debt not exceeding 20*l.* exclusive of costs. It appeared, that the original debt owing by the defendant was between 8*l.* and 9*l.* For the recovery of this, proceedings were instituted, and the defendant ultimately gave a warrant of attorney for the payment by instalments of the original debt and costs, which together amounted to more than 20*l.* The instalments not being paid, judgment was entered up, and the defendant taken in execution. He contended, that the debt for which the defendant must be considered as in execution was the sum for which the warrant of attorney had been given. It was for that sum the judgment was entered up. Now, the words of the statute are, that "all per-

Where a defendant had given a warrant of attorney for debt and costs, to an amount exceeding 20*l.*, though the original debt was less, and had remained in execution for that amount twelve successive calendar months: — *Held*, not entitled to his discharge under the 48 *Geo.* 3, c. 123.

1830.

}

v.

WHITE.

sons in execution on any judgment" not exceeding 20*l.*, were to be entitled to its relief. Here the defendant was in custody for a judgment exceeding 20*l.*, and therefore was not entitled to relief. He cited *Robinson v. Sundell* (a) in support of this argument.

LITLEDALE, J.—The original debt, exclusive of costs, was the sum of between 8*l.* and 9*l.* The difference between that sum and the amount for which the warrant of attorney was given, must be taken as costs. It is only by a technical and artificial construction, that the debt and costs, for which the warrant of attorney was given, can be considered as the debt for which the defendant was in execution. However, as the *Common Pleas*, in the case of *Robinson v. Sundell*, have ruled that the debt must be taken to be the amount for which the warrant of attorney is given, the Court must be bound by that decision.

Rule refused.

(a) 6 Moore, 287.

END OF MICHAELMAS TERM.

Hilary Term,

IN THE FIRST YEAR OF THE REIGN OF WILLIAM IV.

PERKINS *v.* MEACHER.

1831.

Jan. 11th.

JEREMY shewed cause against a rule calling on the Sheriff of *Berkshire* to shew cause why his return of "*languidus*" to a writ of *latitat* should not be quashed. The return was, that he had gone to the lodging of the defendant on the 5th of *August*; that the lodging consisted of but one room; that the defendant was then confined to his bed by illness; that he took him into custody; that he received a certificate of his illness from the medical man attending him, which declared him to be so ill that it would be dangerous to his life to remove him; that, on this statement, he relinquished the custody of the defendant's body; that he went a second time on the 7th of *August*, when he found that the defendant had removed himself out of his bailiwick. He submitted, that it was clear, from all the authorities, that "*languidus*" was a good return. It appeared on the face of this return, that the defendant was so sick that the officer could not keep him in custody for fear of the dangerous consequences of removal; and that there was no means of the officer continuing him in custody but by remaining in a sick room at his own risk, which he was not bound to incur. That rendered the return sufficient. He cited *Cavenagh v. Collett* (a), and *Baker v. Davenport* (b).

By the Sheriff's return of "*languidus*," the illness of the defendant at the return of the writ should appear.

(a) 8 D. & R. 606.

(b) 4 B. & A. 27

1831.
PERKINS
v.
MEACHER.

Steer, in support of the rule, contended, that it was the duty of the Sheriff to keep a defendant in custody, although he might not have him in Court at the return of the writ. He had no right to let him escape, as in the present instance. If it were true that the medical man told him, that the removal of the defendant from his lodging would be the cause of peril to him; it was not therefore true that it would have been the cause of peril to the officer, should he remain there and keep him in custody. He certainly ought not to have allowed him to remain two days out of custody. In both cases cited by the other side, the return stated the illness of the defendant at the return of the writ. Here it was not stated how long the illness lasted, and, therefore, it was quite distinguishable from them.

PARKE, J.—The return here does not account for the defendant up to the period when the return is made. Now, all returns of "*languidus*" are excuses, not for not taking and keeping the defendant in custody, but for not having him in Court at the return of the writ. Therefore, the illness of the defendant stated in the return is no excuse for not keeping him in custody. But, supposing it was an excuse for not keeping him in custody, yet it was no excuse for not going at an earlier period. Certainly, the officer ought to have gone there as soon as it might be reasonably supposed the defendant could be removed with safety. The return must therefore be quashed.

Rule absolute.

1831.

Jan. 15th.

ANONYMOUS.

PLATT opposed a rule calling on the plaintiff to shew cause why the declaration and notice thereof should not be set aside for irregularity. The ground of application was, that the declaration was filed absolutely, and notice given before common bail had been filed. The plaintiff, in his affidavit opposing the rule, admitted the irregularity, but stated that the defendant had, since notice of declaration, applied for time to settle the action. This was a waiver of the irregularity.

Asking for time by a defendant, does not waive an irregularity in the plaintiff's last proceeding.

Steer, in support of the rule, was stopped by the Court.

PARKE, J.—There was something to ask time for. It is a question, whether such an application for time was a waiver of the irregularity. Asking for time is an admission that the plaintiff is in a situation to go on; but I do not know that it is an admission that the step was regular.

Rule absolute, with costs.

DOE v. ROE.

Jan. 23rd.

HOLT moved for judgment against the casual ejector. The only difficulty in serving the declaration was in respect of those premises of which the *Manchester Railway Company* was in possession: the service there was on their book-keeper, on a part of the premises which he occupied, and where he slept.

Service of a declaration in ejectment, on the book-keeper of a Company, in possession of part of the premises:—Sufficient.

PARKE, J.—That will do.

Rule absolute.

1831.

Jan. 23rd.

WEBBER v. MANNING.

To set aside an arrest in a wrong county, there must be an affidavit that it did not take place on the borders of the county, and that there is no dispute as to boundaries.

HULME opposed a rule, calling on the plaintiff to shew cause why the service of process should not be set aside. The affidavit on which the rule had been obtained stated that the defendant had been arrested on a *latitat* directed to the Sheriff of *Surrey*; and the arrest took place in *Holborn*, in the city of *London*. This, he contended was not sufficient, as it did not go on to state that the place was not on the borders of the county of *Surrey* (a), and that there was no dispute as to boundaries.

Comyn, in support of the rule, contended, that where the place in which the arrest took place was clearly on the borders of the county, that was sufficient.

PARKE, J.—I do not know, without such an affidavit, that *Holborn* is not on the borders of the county of *Surrey*, or that there is no dispute as to boundaries (b).

Rule discharged.

(a) Tidd's Forms, p. 179, s. 5 a, 9th ed.

(b) *Vide Storer v. Rayson*, 4 D. & R. 179.

Jan. 23rd.

WALKER v. GREGORY.

An affidavit of debt on articles of agreement should state the consideration.

CHARLES SAUNDERS shewed cause against a rule obtained by *Talford*, requiring the plaintiff to shew cause why, on filing common bail, the bail bond should not be delivered up to be cancelled, on the ground of the affidavit to hold to bail not being sufficiently certain. The affidavit stated, " that *Barnard Gregory* is justly and truly indebted to this deponent in the sum of 75*l.*, upon and by

virtue of certain articles of agreement, bearing date the 8th day of *December*, 1830, and made between the said *Barnard Gregory* on the one part, and this deponent on the other part; whereby the said *Barnard Gregory* did, for the consideration mentioned in the said articles of agreement, agree to pay to this deponent the said sum of 75*l.* at the time therein mentioned, and which is now past." He contended, that this affidavit was sufficient, as it was positive and certain, and disclosed a good cause of action, with the requisite degree of particularity. It stated, that a debt was due upon articles of agreement particularly described; that the agreement was for the payment of a sum of money fixed and certain at a time stated, which time was alleged to be now past. He distinguished this case from those of *Stinton v. Hughes* (a), *Hatfield v. Linguard* (b), *Brook* and others v. *Trist* (c). The words "articles of agreement" were introduced into the affidavit. The word "agreement" implied both a promise and consideration. He cited *Selwin's Nisi Prius* (d), in which was this passage—"The word agreement is not to be understood in the loose incorrect sense in which it is sometimes used as synonymous to *promise* or *undertaking*, but in its proper and correct sense, as signifying a mutual contract on consideration between two or more parties." In every way, therefore, in which the affidavit could be viewed, it set forth a good cause of action with sufficient particularity. It was, besides, drawn according to a precedent in Mr. *Tidd's Forms*.

1831.
WALKER
v.
GREGORY.

PARKE, J. (referring to the precedent).—The term "covenant" is used there, which implies, that the articles were under seal.

(a) 6 T. R. 13.

(b) *Id.* 217.

(c) 10 East, 358.

(d) Page 841, 7th edit.

1831.
 WALKER
 v.
 GREGORY.

Saunders.—The form does not state expressly that the articles of agreement were under seal. But if that were to be implied from the use of the word "covenant," so, also, the word "agreement" would also import a promise made upon sufficient consideration.

PARKE, J.—The affidavit does not state what the consideration was. It might be executory, and therefore, consistently with the affidavit, there might be no cause of action. The consideration might be goods, which were afterwards to be delivered. Now, supposing they were not delivered, it would be too much to say that the plaintiff had been guilty of perjury, but still the defendant ought not to be holden to bail for it.

Talfourd, contra, was stopped by the Court.

Rule absolute.

Jan. 24th.

Ex parte HOLLOWAY.

Where an appeal against a poor rate has been entered and abandoned, the respondents are entitled to costs under the 17 Geo. 3, c. 38, s. 4, up to the time of abandonment.

It is a good practice for the clerk of the peace to ascertain the amount of the costs in such cases.

PALMER moved for a rule to shew cause, why a *mandamus* should not issue directed to certain Justices of the county of *Norfolk*, commanding them to amend an entry made by them at the last *October* Sessions, of their adjudication in a certain appeal, in which a person named *Holloway* was the appellant, against a poor rate made by the parish officers of the parish of *Brancaster*. The appeal was entered at the *July* Sessions, and respited until the *October* Sessions. Notice of trying the appeal at the latter Sessions was given, and subsequently countermanded. The appellant did not appear to support his appeal at the Sessions. The Court confirmed the rate, and directed the costs up to the time of countermanding the notice, when taxed by the clerk of the peace, to be paid by the appellant. But the order entered on the roll was, "It is ordered by this Court, that the Rev. *Henry Hollo-*

way do, upon notice to him given of this order, pay to the churchwardens and overseers of the poor of the parish of *Brancaster*, in this county, the sum of 26*l.* 7*s.* for their reasonable costs and charges upon an appeal determined by this Court, concerning a certain rate or assessment for the necessary relief of the poor," &c. That entry is wrong, because the appeal was not "determined," and the Court had directed the costs to be taxed by the clerk of the peace. The application therefore is, that the entry should be amended, in order to shew, first, that the appellant had not appeared, and, therefore, that the Court had no jurisdiction under the 17 *Geo.* 2, c. 38, s. 4, over the costs; and secondly, that the taxation had not been made by the Sessions itself, but by the clerk of the peace. He cited the case of *Rex v. Justices of Essex* (a), to shew that the Justices had no jurisdiction over the costs; and *Rex v. Skinn* (b), as shewing that the Justices could not delegate their authority to determine the amount of costs.

1831.
Ex parte
 HOLLOWAY.

PARKE, J.—In the case of *Rex v. Justices of Essex* there was no entry of the appeal, and therefore it is clearly distinguishable from the present. The case of *Rex v. Inhabitants of Cawston* (c) is a direct authority to shew, that the Justices may, in such a case, grant costs. With respect to the second point, there is nothing in it. I do not consider the direction to the clerk of the peace as a peremptory order for costs, but a mere preliminary memorandum of what the clerk was to do; and what he has done they have subsequently confirmed by their order. It is every day's practice for the clerk of the peace to ascertain the amount of costs to be allowed. How could the Justices do it themselves? You therefore take nothing by your motion.

Rule refused.

(a) 8 T. R. 585.

(b) 1 Const's Bott, 476, pl. 625.

(c) D. & R. 445.

1831.

Jan. 26th.

GARRATT v. HOOPER.

If a plea in abatement be a nullity, no act of the plaintiff, apparently acquiescing in it, will be construed into a recognition of it.

If money be paid after judgment signed, it cannot be considered as a voluntary payment.

KELLY shewed cause why the rule to reply, and judgment of *non pros.*, signed in this case, should not be set aside, and the sum of 8*l.* paid in consequence, refunded. It was an action for a small sum of money. The plaintiff had declared, and the defendant pleaded in abatement. In the affidavit it was stated, that the "*affidavit*" hereunto annexed, instead of the "plea," is true. There was no other informality. The plaintiff afterwards amended his declaration. The defendant then ruled the plaintiff to reply; and the plaintiff not having replied, the defendant signed judgment of *non pros.*, and 8*l.* costs were paid by the plaintiff to the defendant. Now, if the plaintiff had chosen, he might have treated the plea as a nullity; but having proceeded in the cause, by taking out a summons to amend, it was now too late for him to take advantage of the irregularity of the defendant. He had in fact waived the irregularity in the plea. The payment of the money, too, being voluntary, was also a waiver. He cited *Bray v. Halter* (a), in which it is decided, that, if the affidavit of the truth of a plea in abatement be insufficient, the Court will not set aside the plea, as the plaintiff might have treated it as a nullity, and signed judgment.

Platt, contra.—The ground on which this rule was moved is, that the plea put on the file was a nullity. Now, by the statute of the 4 & 5 *Ann.* c. 16, s. 11, it is enacted, that "no dilatory plea shall be received in any Court of record, unless the party offering such plea by affidavit prove the truth thereof, or shew some probable matter to induce them to believe that the fact of such dilatory plea is true." There was nothing here to shew that the plea

(a) 2 B. Moore, 213.

was true. There was in fact no plea at all on the file. Then the defendant taxed his costs, and threatened to take out execution if they were not paid. Now, he would not have been entitled to costs at all if the plaintiff had entered a *cassetur billa*. He must, therefore, refund them. It is said, we adopted the plea by applying to amend our declaration. But amending a declaration is not like a step in the cause, for it may be amended any time before the trial. The payment of the money is no waiver of our objection, for we paid it under duress.

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TAUNTON, J.—I am of opinion, under all the circumstances of the case, that this judgment of *non pros.* was improperly signed; and the ground of my opinion is, that the statute of *Anne* is peremptory. An affidavit of the truth of all dilatory pleas is required by that statute, and no affidavit was here filed. There is no authority to shew that it must not be considered as a nullity. If it is a nullity, I apprehend the plaintiff is under no obligation to reply; and the rule to reply to a nullity he was not bound to act upon. I think, therefore, in this case, no judgment should have been signed for not replying. There is this difference between an irregularity and a nullity: an irregularity may be waived, but a nullity cannot. It is not in the power of a party to waive it; as the act of Parliament declares it to be a nullity, the Court is so to judge of it. This money appears to me to have been paid under duress of an immediate execution being put into his house. I do not go upon what the clerk is supposed to have said, namely, if the money were not paid an execution would instantly issue. It cannot be considered as a voluntary payment; it must, therefore, be repaid. The payment of costs cannot be regarded as a waiver of the nullity.

Rule absolute, without costs.

1831.

Jan. 27th.

LAWES v. CODRINGTON.

Where a *fi. fa.* has issued, and a levy less than the plaintiff's debt has been made, a *ca. sa.* cannot issue till after the return day of the *fi. fa.*; although in fact the Sheriff has made a return to it, and the *ca. sa.* recites the writ and the Sheriff's return.

BARSTOW shewed cause against a rule calling on the plaintiff to shew cause why the *ca. sa.* issued in this case should not be set aside for irregularity, and the sum paid to be discharged from custody under it, restored. The facts were, the defendant had given a *cognovit*. On this, a judgment was entered up, and a *fi. fa.* issued in the last long vacation, returnable on the first day of *Michaelmas* Term. A levy was made on the defendant's goods, but it realised only a part of the amount. The Sheriff, at the request of the plaintiff, during the vacation, and before the return day, made a return to this writ, and the plaintiff then issued a *ca. sa.* for the residue of the debt against the defendant. She was taken upon it, and paid the amount. The *ca. sa.* and the *fi. fa.* were both returnable on the first day of *Michaelmas* Term. It would be contended in support of the rule, that the *ca. sa.* could not be issued until the return of the *fi. fa.*, and, therefore, the issuing of it was an irregularity; but he should submit that the *fi. fa.* was returned, for all practical purposes, before the *ca. sa.* was issued. The proceeds of the seizure had been paid over by the Sheriff to the plaintiff; the writ was returned, and the return recited in the *ca. sa.* It was true that this was done before the Sheriff was bound to pay over or to make a return according to the exigency of the writ, but there was nothing to prevent or forbid his so doing. If he were not allowed to do so, this consequence would result—a defendant might not have more property which the Sheriff could seize, than would amount to a shilling, and then the plaintiff would be prevented from proceeding against the person of the defendant until after the return of the *fi. fa.*, which might, as in this case, include the long vacation. The best way of trying this question is, by considering how these proceedings would be entered on the roll. No

inconsistency or incongruity would there exist, because the *teste* of the writ of *ca. sa.* would not appear. In *Miller v. Parnell* (a) the Court observed, that if the plaintiff, after suing out a *fi. fa.*, could *abandon* it, and sue out a *ca. sa.*, it would confer a power which might be much abused. Here, the plaintiff had not abandoned his *fi. fa.*, and if, in such a case, he were not allowed to sue out a *ca. sa.* before the return of the *fi. fa.*, the converse of the mischief would exist. In *Miller v. Parnell* it was also remarked, if the *fi. fa.* be returned, there is something to bind the plaintiff, and to limit the amount for which he shall have the body, by shewing how much he has already gotten. Now here the *fi. fa.* was returned, and therefore here was the means of limiting the amount for which the plaintiff should have the body. So far was that case in support of his proposition. He, therefore, should submit that the rule must be discharged.

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Follett, in support of the rule, contended, that although a plaintiff might have two different writs if he chose, he could not have a *ca. sa.* until the return of the *fi. fa.* Now, the return of the *fi. fa.* meant by the law, must be the return to the Court. The indorsement on it by the Sheriff of what he had done, and sending it to the plaintiff, were not returning it. The *fi. fa.*, therefore, not being returned, the issuing of the *ca. sa.* was an irregularity.

PARKE, J.—If you execute the *fi. fa.* you cannot take another step till the following Term, for that writ cannot be returned into Court, until the Court, in contemplation of law, is sitting. You have been too rapid; you should have waited till the return of the *fi. fa.* before you issued the *ca. sa.* The rule must be made absolute, but *without* costs, and no action must be brought.

Rule absolute, without costs.

(a) 6 Taunt. 370.

1831.

Jan. 29th.

Where the Court will grant time to put in fresh bail in error.

ANONYMOUS.

LEE applied for further time to put in bail in error, on the ground that the original bail had been alarmed by the defendant in error, and therefore would not become bail.

PARKE, J., refused to allow further time, unless some error on the record was shewn, and the amount of the judgment deposited in the hands of the Master.

Jan. 31st.

REX v. DAY. REX v. PATTESON.

In *quo warranto* informations, the Court will not force an indigent relator to give security for costs, when it does not appear that the fact of indigence had not come to the defendant's knowledge before issue joined.

QUO warranto for usurping the office of alderman of the city of *Norwich*. Rules had been obtained on a former day calling upon the relator to shew cause why he should not give security for costs in these prosecutions, on affidavits stating that the relator, (a freeman of the city of *Norwich*, and entitled to vote at the election of aldermen), was in indigent circumstances; that the proceedings were instituted for local electioneering purposes, and were in fact carried on by the subscriptions of certain individuals named in the affidavits. It was also ordered, that all proceedings should be stayed until cause should be shewn.

Austin shewed cause.—The application was too late. In *Rex v. Wynne* (a), the application was made after information filed; and in *Rex v. Trevenen* (b) and *Rex v. Wakelin* (c), the question of security for costs was raised upon the motion for making absolute the rule for exhibiting the information. These were the only cases similar to the present. But there

(a) 2 M & S. 346.

(b) 2 B. & A. 339.

(c) 1 B. & Ad. 50.

is no difference in principle between these cases and the case of similar applications in civil actions. In civil suits, where the defendant applies for security for costs, in consequence of the plaintiff's residence abroad, the rule is, that he shall make his application as soon as he is aware of the fact, and that he shall take no step after he becomes cognizant of it, and before his application for security. The rule is clearly laid down in *Duncan v. Stint* (a), where it was said by the Court, "when a cause is pending, a party, if he means to apply for security for costs, must take no step after he knows that the plaintiff is out of *England*; for a defendant ought not to wait until expense has been necessarily incurred, which must frequently be the case, particularly in actions of trespass and replevin." The last observation applies also to pleadings in *quo warranto*, which are frequently of great length. In this case the information was filed in *Michaelmas* Term, 1829; the pleas, which were very voluminous, not till *Trinity* Term, 1830. Long replications were afterwards filed, to which the defendants rejoined, and added the *similiter*. There was no affidavit (as there ought to have been, had the fact been so), that the defendants did not know the circumstances disclosed in their affidavits before their pleas were filed. The rules must be discharged with costs, because they were drawn up for staying proceedings, as well as for security for costs. He cited *Baillie v. De Bernales* (b).

Kelly, contra.—Issue has not been joined, for the *similiter*s, which had been added by the defendants, were afterwards struck out by the prosecutor.

PATTESON, J.—At all events, issue had been joined so far as the defendants are concerned, for the *similiter*s were added by themselves.

(a) 5 B. & A. 702.

(b) 1 B. & A. 331.

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Kelly.—Allowing that to be so, although security cannot be demanded for costs already incurred, the Court may impose it for costs to be incurred hereafter. *Duncan v. Stint* does not apply. In that case, the ground of the application was the plaintiff's residence abroad; in this it is the relator's indigence, and the circumstance of the proceedings being carried on by subscription. In the case of a bankrupt plaintiff, security for costs has been imposed, on the ground of the action being really carried on for the benefit of the assignees.

PATTESON, J.—The relator is a freeman, and entitled, under the statute of 9 Ann. c. 20, to institute these proceedings. The parties have proceeded to issue, and it does not appear that the defendants were not aware of the circumstances disclosed in their affidavits before issue joined, or, in fact, at the time of filing the information. The rule adopted in civil actions is applicable here. According to that rule, the application comes too late; and the rules that have been obtained must be discharged. As the point was clear, the application was a mere experiment; for which reason, and because the rules were drawn up for a stay of proceedings, as well as for security for costs, the rules must be discharged, with costs.

Rule discharged, with costs.

END OF HILARY TERM.

Easter Term,

IN THE FIRST YEAR OF THE REIGN OF WILLIAM IV.

WILLAN v. COLLINS and Wife.

1831.

April 16th.

HUTCHINSON moved for a rule to shew cause, why the bill of *Middlesex*, in this case, should not be set aside, on the ground that, in the body of the writ, the defendant was required to appear on *Tuesday*, the 15th of *April*, there being no such day. In the notice at the foot, however, the day of appearance was stated to be *Friday*, the 15th of *April*.

An inconsistency in the body of a bill of *Middlesex* may be cured by the notice at the foot of the writ.

TAUNTON, J.—I think that will do. Though the date of the appearance day mentioned in the body of the writ is inconsistent, yet, as the notice is the material part, and as the day of appearance is properly stated there, the inconsistency is cured.

Rule refused.

FOSTER v. HILTON.

April 25th.

CHILTON shewed cause against a rule calling on the plaintiff to shew cause why, on the payment of 75*l.* 15*s.* 6*d.* to the plaintiff's attorney, all proceedings should not be

Where the sheriff executes a *fi. fa.*, and he receives notice of a year's rent being due, and the goods on the

premises are not sufficient to satisfy a year's rent, he must withdraw; and, if he sells, the Court will not stay proceedings in an action against him on the 8 *Ann.* c. 14, s. 1, on paying over the proceeds of the sale.

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stayed, and the plaintiff pay the costs of this application? It was an action founded on the 8 *Ann.* c. 14, s. 1, against the sheriff, for removing goods under a *fi. fa.* from the premises in which he had executed a distress, after notice had been given that a year's rent was due to the landlord, without paying rent to that amount. The sum proposed to be paid to the plaintiff was short of a year's rent; he therefore insisted, that, until a year's rent had been paid to the landlord, the sheriff had no right to sell. Here, a sale had taken place, and although the proceeds amounted to less than a year's rent, the sheriff could not stay these proceedings, because it was necessary to pay a year's rent before the goods were sold. If there be not sufficient for that purpose, I contend that the sheriff must withdraw; and if he chooses to sell, the mere payment of the sum produced by the sale is not sufficient to entitle him to have the proceedings against him stayed.

Platt, in support of the rule, contended, that the plaintiff could only be entitled to recover the amount which the sale produced. It could not be said, that when the sheriff received 75*l.* 15*s.* 6*d.* from the sale of the goods, he was bound to pay more to the plaintiff. If so, it was exceedingly unjust to force the sheriff to go on, and to pay the costs of the suit. He referred to the case of *Henchett v. Kimpson* (a). There, the sheriff had sold, and the proceeds of the sale were not equal to the amount of rent due. The counsel against the sheriff relied there on the construction of the act of Parliament now adopted by Mr. *Chilton*. But the Court there said—"Let the Prothonotary take an account of the goods taken in execution, and what they were sold for, and let the sheriff be allowed such costs as were incurred before notice given him of the rent due to the landlord; and, after all just al-

(a) 2 Wils. 141.

lowances, let the rest of the money be paid by the sheriff to the landlord."

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TAUNTON, J.—There the parties proceeded by motion, but here they proceed by action. The question therefore is, whether this case must not be left in the hands of the jury.

Platt submitted, that the principle in both cases was the same. The application in both cases was to the equitable jurisdiction of the Court. It was to the power which the Court exercised to prevent its proceedings from being made instrumental to injustice. It was on the same principle, that, where conflicting claims were made by the assignees of a bankrupt and a judgment creditor, the Court interfered to prevent the sheriff from being subjected to the injustice, which would arise from his being forced to determine those claims. The sheriff was here ready to pay the money which he had levied. It would hardly be said, that he was bound to pay more than he had himself received.

TAUNTON, J.—My opinion is, that the Court cannot interfere in this summary way. The act of Parliament provides, that, before the removal of goods from the premises, the sheriff shall pay a year's rent; and if the sheriff is guilty of any contravention of that act of Parliament, the landlord may apply to this Court by a rule calling on the sheriff to pay over to him what the goods produced on the levy. The landlord has not resorted to the summary jurisdiction of this Court. If he had applied to this Court by motion, then the Court might have done that which was done in *Henchett v. Kimpson*, that is to say, might have referred the matter to the Master to take an account of the goods taken in execution and what they were sold for, and have directed that the sheriff should

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be allowed such costs as he had incurred, before notice was given him of rent being due to the landlord; and, after all allowances, have ordered the rest of the money to be paid by the sheriff to the landlord. But the landlord here has not thought proper to avail himself of the summary jurisdiction of this Court. He has proceeded by action on the case. He has a right so to do. In a special action on the case, the landlord is entitled to general damages. Those damages are not to be limited by the mere amount of the sum of money produced by the sale. He has a right to say—"If you had proceeded regularly, according to the statute, the whole rent would have been paid; and you not having proceeded regularly, but having chosen to sell before the year's rent was paid, I have a right to general damages; by your misconduct in not giving proper notice, or by other negligent conduct, the goods sold badly." All these matters may be made use of to aggravate damages. This is an application, that all proceedings in the case should be stayed on paying merely the dry proceeds of the goods after sale. I am of opinion that is not the measure of damages. The damages may exceed that measure, and therefore the Court is not now to take that as a measure, which may not be taken as one at the trial. The rule must therefore be discharged and with costs, as it is a new experiment, for which there is no precedent as far as I know (a).

Rule discharged with costs.

(a) Another rule in a different form, but with the same object, was afterwards obtained before the four Judges, in this case, which

was discharged with costs; and the judgment of *Taunton, J.*, thereby confirmed.

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EASTER v. EDWARDS.

April 25th.

CLARKSON applied for leave to justify three bail instead of two. The sum, which the plaintiff swore to be due, was 700*l*. The defendant was a very poor man, and it would be next to impossible for him to obtain two persons as bail, each of whom could swear himself worth 1400*l*.

Where a poor defendant was arrested for 700*l*. the Court granted a rule to justify three bail instead of two.

TAUNTON, J.—That indulgence is only granted in cases of *trover*, and other cases where the sum for which the action is brought is very large, in cases where the amount is thousands and not hundreds, as here. In some such cases, I have known six, and sometimes eight, persons allowed to become bail.

Clarkson cited *Tidd* ^(a), where it was laid down, that, in the *King's Bench*, where the debt is large, the Court will allow three or four persons to become bail in different sums, amounting altogether to the requisite sum. He submitted, that, whether the sum was to be considered large or not must depend on the circumstances of the party holden to bail. Here he was exceedingly poor.

TAUNTON, J., inquired of the Master what was the practice in such cases.

The Master stated that the usual course was, to apply to the Court for leave to justify a greater number of persons than two as bail; then, having drawn up the rule, to serve it on the plaintiff's attorney or agent at the same time as the notice of justification; and if the plaintiff in-

(a) 1 Tidd, 245, 9th ed.

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tended to make any objection, he must urge it when the bail come up to justify.

TAUNTON, J.—You may take your rule.



April 29th.

FEARNLEY'S Bail.

"Manufacturer" is a bad description of bail.

WHITE opposed bail by affidavit on the ground of misdescription.

The bail resided at *Bradford* in *Yorkshire*, and was described as a "manufacturer." This, he contended, was insufficient, without stating of what he was a manufacturer.

Smith, in support of the bail, submitted, that, as *Bradford* was a manufacturing town, the description of manufacturer was a sufficient one.

TAUNTON, J.—The fact of its being a manufacturing town is just the reason why the description is insufficient; because there is a great number of persons who would be equally entitled to such a description. If manufacturers were rare, if there were only one or two in the place, it might be otherwise.

Time was given to serve a fresh notice, as no affidavit was produced to shew that the plaintiff had been unable to find the bail.

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MARZETTI v. COMTE DU JOUFFROY.

(Before the four Judges.)

May 2nd.

IN this case, the defendant was arrested on an affidavit of debt for 5000*l.* and upwards, claimed to be due from the defendant to the plaintiff as administrator of an intestate. The affidavit was sworn by the deponent at the bill of *Middlesex* Office, before Mr. *Boddy*, the proper officer there, Mr. *Sloper* the plaintiff's attorney having been first duly sworn to interpret the contents of the affidavit and the oath to the deponent, and the *jurat* stating that the affidavit had been read over and explained to the deponent in the *French* language, by Mr. *Sloper*, and the deponent sworn upon Mr. *Sloper's* interpretation.

A rule was obtained by Sir *James Scarlett* calling on the plaintiff to shew cause why the defendant should not be discharged out of custody on filing common bail. This rule was obtained on an affidavit, which set out an office copy of the affidavit of debt and bill of *Middlesex*, and which stated that search had been made at the Prerogative Office, and no letters of administration to the deceased could be found to have been granted, either to the plaintiff or any other person. Upon the whole of these facts, four objections were taken on behalf of the defendant:—*First*, that the *jurat* was insufficient, in not stating that the interpreter understood the *French* and the *English* language;—*Secondly*, that the plaintiff's attorney ought not to have been the interpreter;—*Thirdly*, that the process was not warranted by the affidavit, the former describing the plaintiff as suing in his own right, without stating his representative character, and the latter disclosing a cause of action in his representative char-

Where an affidavit of debt was sworn by an administrator, a Frenchman, and the *jurat* did not state that the interpreter understood the *French* and the *English* language, and the plaintiff's attorney acted as interpreter; and the process described the plaintiff as suing in his own right, and the affidavit stated the debt to be due in his representative character; and on search at the Prerogative Office, *Doctors' Commons*, but at no other ecclesiastical office, no letters of administration appeared to have been granted of the estate of the deceased to any one; but the *jurat* stated that the affidavit had been read over and explained to the deponent in the *French* language, and that the interpreter was sworn upon his interpretation:—*Held*, that the affidavit

was sufficient, and the Court therefore refused to discharge the defendant out of common bail.

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acter only;—*Fourthly*, that the plaintiff did not appear to be an administrator.

Barstow shewed cause.—The first objection as to the insufficiency of the *jurat*, in not stating that the interpreter understood the *French* and *English* language, was answered by the case of *S. Bosc, Widow, v. N. A. Sollier (a)*. In that case, the *jurat* ran in a similar form to the present; and Lord *Tenterden*, in his judgment, said—"I think the *jurat* is sufficiently certain to justify us in drawing the conclusion, that the affidavit was duly sworn. It alleges that the affidavit was interpreted to the deponent. Now, that could not be unless the deponent and the interpreter understood one and the same language. We must trust the certificate of our own officer, that the deponent was sworn to the truth of the affidavit. If that part of the *jurat*, which comes in by way of parenthesis, speaking of the interpreter, 'he having first sworn that he understood the *English* and the *French* languages' had been left out, still the *jurat* would have been sufficient. If it were necessary, however, to supply the alleged defect, it might be supplied by an affidavit stating the fact, that the plaintiff understood the language in which the oath and affidavit of debt were interpreted. We must trust to our officer, that he does not suffer a party to make an affidavit, without taking care that the deponent understands what he swears." The other Judges concurred, and the rule was discharged. The second objection, that the affidavit of debt should not have been sworn before the plaintiff's attorney, was equally untenable. The rule of Court prohibiting the swearing an affidavit before the plaintiff's attorney, did not apply to the affidavit of debt. There was, in fact, an express rule of Court allow-

(a) 8 D. & R. 514; S. C. 4 B. & C. 358.

ing such an affidavit to be sworn before the plaintiff's attorney (a). The third objection proceeded on a misapprehension of the rule as to process, on which the plaintiff intends to sue in a representative character. The true construction of that rule was, that, if the plaintiff sued out process in a limited character, he could not afterwards enlarge his right, and declare in a general character. But if he had sued out process in a general character, he might afterwards limit his right, by declaring in some special or representative character. This distinction was recognised by the Court in the case of *Ashworth v. Ryall* (b). That case, for the present objection, was expressly in point. There, the plaintiff had sued out general process, and had declared specially, as administrator, and the Court, upon an application by the bail, refused to enter an *exoneretur* on the bail-piece. Then, with respect to the fourth objection, the Court never tried, upon affidavit, whether the party was administrator or not. But even if they would, the affidavit on the other side did not shew enough to maintain this objection. Search appears to have been made in the Prerogative Office, *Doctors' Commons*, and no administration was found to have been taken out there. That might be true, and yet the administration might have been a diocesan administration, or one issued out of the Prerogative Court of *York*. The plaintiff might therefore be administrator, although the facts stated on the other side were true. On these grounds he submitted that the rule must be discharged.

Sir *James Scarlett*, *contra*.—The first objection was not answered by reference to the case cited; because, it there appeared, that the interpreter sworn did understand the language in question. The second objection could not certainly be supported. The third objection was

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(a) R. E. 15 Geo. 2, Reg. 2, K. B.

(b) 1 B. & A. 19.

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unanswered, as the process was not supported by the affidavit of debt. In the case of *Ashworth v. Ryall*, the question arose in a more advanced stage of the cause, namely, when the plaintiff had declared in a representative character, after the defendant had been brought into Court. The fourth objection might have been answered, in point of fact, if it were shewn, that there was really a good administration; but the mere reasoning upon it, without the fact as the basis of the reasoning, was insufficient. The rule must therefore be made absolute.

Lord TENTERDEN, C. J.—I think none of the three remaining objections can prevail. The affidavit is the same in substance as in the case of *Bosc v. Sollier*, and it appears to correspond with the form given in *Tidd's Forms* (a). In those forms, I also observe, that the form of the interpreter's oath is to be found; and we must give our officer due credit for having properly discharged his duty in administering that oath. With regard to the objection, that the affidavit shews a cause of action in the representative character, and the process does not describe the plaintiff in that character, I think the case falls within the established rule, that the addition of the representative character is not necessary in the process. If, when the plaintiff declares, he should set out a cause of action different from that which appears in the affidavit of debt, the defendant or his bail can apply to the Court for relief; but this is no objection to the process in its present form. As to the last objection, I think the defendant's affidavit does not go far enough; and that it was not necessary for the plaintiff to answer it. For aught that appears, the plaintiff may be administrator, although letters of administration might not have been granted by the particular Court in which the search was made. The

(a) *Tidd's Forms*, 74, (s. 1, b.), 9th ed.

rule must therefore be discharged ; but, on account of the struggle between the parties, we do not think it a case in which it ought to be discharged with costs.

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Rule discharged, without costs.

—◆—

GRIFFIN v HIGGIN.

May 4th.

MILLER obtained a rule to shew cause why the service of the writ of *latitat* in this case, and subsequent proceedings thereon, should not be set aside with costs ; and that, in the mean time, proceedings be stayed.

In a county palatine the defendant should be served with the *latitat*, and not with the mandate of the Chancellor.

W. C. Rowe shewed cause.—This rule was obtained on the ground of an alleged irregularity in the service of serviceable process in the county palatine of *Lancaster*, and much reliance was placed on the case of the Earl of *Shrewsbury v. Haycroft* (a). That case, however, was very cursorily reported, and no authorities were cited. It was there held, that the service of both process and mandate was necessary.

TAUNTON, J.—It does not follow, that, had the decision been otherwise, the Court of *Common Pleas* must necessarily bind this Court.

W. C. Rowe.—The irregularity here complained of is the service of the *latitat* from this Court, instead of a mandate from the Chancellor. This is a question of practice, and it will be found that the practice must entirely depend on the 5 *Geo. 2*, c. 27, an act explanatory of the

(a) 6 Bing. 104.

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12 Geo. 1, c. 29, which first made provision for serviceable process, and which provision, as there expressed, has been adopted by the subsequent acts 19 Geo. 3, c. 70, s. 2, and 7 & 8 Geo. 4, c. 71. By the first section of the statute of Geo. 2, the affidavit of the service of process, with a copy of which the defendant is to be served, is to be made out before any Judge or Commissioner of the Court out of which such process shall issue, authorized to take affidavits in such Court, and which affidavit is thereby directed to be filed *gratis*. On two grounds, the process here contemplated must have been the process out of the superior Court.—*First*, because such commissioner can only be appointed by one of the superior Courts; *Secondly*, because, if the affidavit were filed in the Court of the county palatine, the affidavit could not subsequently be read and proceedings taken on it in this Court; and consequently the effect of the original process would be evaded. The words of the act are “such process,” and, as the same process is described throughout the whole of it, the copy to be served must be evidently a copy of the process of this Court. It is true, that in *Beacon v. Smith*, Mich. T. 1 Geo. 2, a different doctrine was held by the *Common Pleas*; but that decision was over-ruled by the same Court, after the 5 Geo. 2, in the case of *Byers v. Whitaker* (a). The case still more strongly in point, is that of *Griffin v. Alcock* (b), which, after having been thrice considered, was at length decided in favour of the service of the *latitat*, in a most elaborate judgment by the Chief Justice of the *King's Bench*. For these reasons, therefore, the rule must be discharged.

Miller, contra.—Although it may be necessary to serve the *latitat*, it does not follow that it is not requisite to serve the mandate also. On the authority of the Earl of

(a) Barnes, 406.

(b) 2 Barnard. 339.

Shrewsbury v. Haycroft, it was necessary to have served the mandate.

1831.

GRIFFIN
v.
HUGGIN.

TAUNTON, J.—I am clearly of opinion, that the service of the *latitat* in this case was sufficient. The case in the *Common Pleas* appears to have been decided without sufficiently adverting to the authorities. Those which have been produced here are both in point. In the one, it was held, that the process from this Court alone was sufficient; in the other, that a copy of that process might at once be served. The judgment, in the latter more especially, was given at length, and on mature consideration by the Chief Justice of this Court; and that judgment I am not prepared, on the authority of the case in the *Common Pleas*, to reverse. Then, as to serving both the *latitat* and the mandate of the Chancellor, there is this objection to that course. When the *latitat* is received, it is to be taken to the Chancellor's office, and filed there, in order to obtain a mandate. When it is filed there, how can it be served on the defendant? The rule must be discharged, without costs, as perhaps the party was misled by the authority of the case in the *Common Pleas*.

Rule discharged, without costs (a).

(a) See Tidd's Prac. 168, 9th ed. In the subsequent part of the term, an application was made to the full Court in another case, to set aside the service in a county palatine, on the ground that both *latitat* and mandate had been

served, instead of the *latitat* only. There, Lord Tenterden, C. J., said, —The service of the *latitat* would have been sufficient, but the service of both must be unobjectionable.

1831.

May 4th.

BURROUGHS v. CLARKE.

Where an award is taken up by one party, and all the costs paid to two out of three arbitrators, the third arbitrator has no remedy against either party in the cause.

Semble, an arbitrator has no action for his fees.

KELLY shewed cause against a rule obtained by *Palmer*, calling on the plaintiff and defendant to shew cause, why they should not pay a Mr. *Cully* the sum of 50*l.*, or such other sum as should be found due on taxation for his services as an arbitrator. The facts set forth in the affidavits are the following:—The cause had been referred at the *Norfolk* Assizes to three gentlemen, Mr. *Cully*, Mr. *Pratt*, and Mr. *Evans*, a barrister, the two former gentlemen not being in the legal profession. An award was made by Mr. *Pratt* and Mr. *Evans* only, Mr. *Cully* not choosing to attend and join in it, from conscientious motives. The award orders that each shall pay their own costs, and that the costs of the award shall be paid in moieties by the plaintiff and defendant. The amount of the costs of the award was 113*l.* This sum was paid by the defendant. It does not appear how much was paid to each of the two arbitrators. Now, the third arbitrator, Mr. *Cully*, who did not join in the award, says he ought to be paid a share. But if he has any remedy, it is only by action. The rule of Court empowers the Court to enforce the award. It has been enforced by the payment of the costs, according to its direction. Therefore the Court has no longer any jurisdiction. This application refers to matter entirely *dehors* the award, and is wholly without precedent. It is in fact merely a speculation to try to induce the Court to interfere in that, over which it has no jurisdiction. The rule, therefore, ought to be discharged with costs.

Palmer, in support of the rule.—When two persons are appointed arbitrators, they are arbitrators for both

parties. The arbitrator becomes a party to a rule of Court, and there is an express promise, in fact, by the rule of Court, to pay the arbitrator. In a case in the Court of *Common Pleas*, *Hicks v. Richardson* (a), an attachment was granted against the plaintiff for not performing an award.

1831.
BURROUGHS
v.
CLARKE.

TAUNTON, J.—That case is materially different from this. There, the money due to the arbitrator was actually paid.

Palmer.—In that case *Eyre*, C. J., says—“ Shall we oblige the arbitrator to bring an action? Should we not have allowed him to say on this sort of application, that the costs of the arbitration amounted to so much, and that, by the terms of the award, they were to be paid by both parties, and that this plaintiff had refused to pay his moiety? I consider this motion in the same light as if the arbitrator had come to enforce the attachment. On the substantial justice of the case, the plaintiff is bound to pay his moiety of the costs. He has submitted, by a rule of Court, to pay them, and the Court will enforce the payment by attachment. It is all matter of form, whether the arbitrator himself applies for the attachment, or the party who has paid the money to the arbitrator. I cannot but think that it was the better course to be taken in this case, for the arbitrator to get the whole costs from the defendant by withholding the award, who may redress himself by one attachment, than for the defendant to have an attachment against the plaintiff for not obeying the award as far as concerned him, and then for the arbitrator to have an attachment against him for the moiety of the costs of the arbitration. What a scene of litigation, expense, and vexation, might this strictness produce? Supposing no ob-

(a) 1 B. & P. 93.

1831.
BURREOUGHES
v.
CLARKE.

jections to the expenses themselves, I think the attachment should issue."

TAUNTON, J.—But there, one party had paid all the costs, and the Court ordered that each party should pay a moiety, according to the direction of the award. He had a right to contribution there, because he had paid all the costs. The arbitrator had no grievance of which to complain, as he had been fully paid.

Palmer.—I submit that this application, founded on the case I have cited, ought to entitle me to have my rule made absolute. Where an arbitrator has attended meeting after meeting, and then thinks he cannot reconcile his conscience to the award, he is still entitled to a fair remuneration for his services. Who will undertake the office of arbitrator, if he is to be turned round in this manner and receive nothing for his trouble? As to the proportion of the money paid as costs of the award, which the arbitrator would be entitled to receive, the Court has power to determine that by taxation. In the case of *Barratt v. Parry (a)*, the Prothonotary expressed an opinion to that effect.

TAUNTON, J.—I am of opinion that this rule must be discharged. I intimated, when it was moved, that it appeared to me an application of the first impression; for I remembered one case before I came to the bar, in which I had a distinct recollection, that Lord *Kenyon* ruled that the office of arbitrator was altogether honorary, and that an arbitrator could not maintain an action for his fees. And on that occasion, the plaintiff, who sued for his fees as arbitrator, was nonsuited. But it is not necessary to give an opinion on that point in this case, because, admitting

(a) 4 Taunt. 657.

that an arbitrator is entitled to remuneration for his trouble, here, that to which these arbitrators are entitled has been paid. The award orders, that the costs of the award shall be paid in moieties. One moiety is to be paid by one party, and another moiety by the other. Then, the party, in whose favour the award is made, applies to one of the arbitrators, to know the amount of the charges of the award, and he tells him 113*l*. That sum is paid by the person who so applies, and the arbitrator gives up the award to him. The charges are paid to the arbitrator, who would not have delivered up the award without payment. If this 113*l*. has been improperly divided between two, instead of among three, that is a matter between themselves; and the gentleman who has had the misfortune not to get any thing, if so advised, may bring an action for his share. That he may do, though I give no such advice. If Mr. *Cully*. is entitled to any thing, his only remedy is against the arbitrators. The case in 1 *Bos. & Pull.* is perfectly different from this. There, an application was made for contribution, and the Court ruled, that the party, who had paid the whole costs, was entitled to an attachment for the non-payment of contribution. What is said by *Eyre*, C. J., went beyond the case, and whatever dropped from him was extra-judicial, and I apprehend there is no reason for any such observation. The rule must therefore be discharged, and as this application is merely experimental, it must be discharged with costs.

Rule discharged, with costs.

1831.
BURROUGHS
v.
CLARKE.

1831.


May 7th.

ANONYMOUS.

(Before the four Judges.)

A Judge cannot grant costs at chambers.

ON shewing cause against a rule *nisi* for discharging an order of Mr. Justice *Taunton*, dismissing a summons with costs, on the ground, that a Judge at chambers has no power to grant costs: it was contended that a Judge at chambers must be taken as possessing the same power as the Court itself, although sitting apart from it; and, therefore, he had power to grant costs. It was admitted, that no reported case could be found, in which it was decided that a Judge had that power at chambers.

All the four Judges present observed, that it was contrary to their practice to allow costs at chambers, and, as far as they were aware, contrary to the practice of the other Judges.

LORD TENTERDEN, C. J.—I am of opinion, that this rule for discharging the order must be made absolute. It is true, perhaps, if we were to inquire very minutely into the matter, it might be found that a Judge has power to grant costs on summonses; but that is a power which has never been exercised, and the practice has been not to do so, and we therefore must be bound by that practice. If we were not to do so, we should discourage a very useful mode of proceeding, *viz.* by summons. This is a mode much more economical than that by application to the Court. By exercising a power to give costs at chambers, we should prevent parties from having recourse to this less expensive mode.

LITLEDALE, J., PARKE, J., and PATTESON, J., concurred.

Rule absolute.

1831.

The KING v. The Sheriff of MIDDLESEX, in the case of
DAVIS v. ALLEN.

May 5th.

JOHN JEFFERY WILLIAMS shewed cause against a rule for setting aside an attachment against the sheriff. The process was returnable in *Michaelmas* Term, but the rule for bringing in the body was not served till the first day of *Easter* Term. There was, therefore, some delay in the proceedings of the plaintiff against the sheriff, but that arose from a negotiation having been carried on between the parties. During the pendency of that negotiation, the plaintiff took no steps in the cause. That was no reason for depriving the plaintiff of his remedy against the sheriff. The existence of a negotiation was a sufficient excuse for his supposed *laches*.

Where a plaintiff, on account of negotiations between himself and the defendant, delays for a term his proceedings against the sheriff, the latter is discharged by the plaintiff's *laches*.

Platt, contra.—When time is given to the party by negotiating, the sheriff is discharged. He cited *The King v. The Sheriff of London*, in *Peacock v. Leigh* (a); *The King v. The Sheriff of Surrey*, in *Brewer v. Clarke* (b); and *The King v. The Sheriff of Surrey* (c).

TAUNTON, J.—As I understand the facts of this case, they are these:—The rule for bringing in the body might have been served on the first day of *Hilary* Term, but it was not served until the first day of *Easter* Term; so that in truth the plaintiff permitted the whole of *Hilary* Term to elapse without taking the necessary steps in order to bring the sheriff into contempt. This *laches*, it is said, was caused by a negotiation between the parties. But it strikes me, that if the plaintiff intends to rely on the liability of the sheriff, he is bound to pursue his remedy promptly; but here he has not done so. It does not

(a) 1 Taunt. 111. (b) Id. 159. (c) 7 T. R. 452.

1831.

The KING
v.
The Sheriff of
MIDDLESEX.

appear that the Sheriff has suffered any special damage; but, independently of the want of special damage, it appears to me, that the negotiation between the parties being a matter with which the sheriff has nothing to do, and the plaintiff in consequence delaying his proceeding against the sheriff, he is not entitled to an attachment. Under the circumstances of this case, where the delay of a whole term has taken place, and nothing has been done by the plaintiff against the sheriff, the attachment ought not to have been moved.

Rule absolute, with costs.

May 5th.

The Court will
not grant a *certiorari* to remove a warrant of distress to levy poor-rates.

Ex parte TAUNTON.

ERLE moved for a rule *nisi* for a *certiorari* to remove a warrant of distress, granted by certain Justices of the county of *Surrey*, to levy poor-rates, and any adjudication or order, if any, on which it was founded, into this Court. He made this application on the part of Mr. *Taunton*, a gentleman residing in *Surrey*, whose goods had been taken for arrears of poor-rates. The ground of his complaint was, that the warrant had been issued against him without his ever having been summoned, or heard against the issuing of it. It was clearly the duty of the Justices to summon and hear the defendant, before they issued such a warrant. That was the ground of the complaint, but the difficulty was, whether the *certiorari* would extend to a warrant of distress. The rule of law was, that the *certiorari* would only remove judicial acts, and did not extend to ministerial acts or writs of execution. But either there must be a judgment before the warrant issues, because the law requires the hearing and determining, which implies a judgment; or, if the statute 43 *Elix.* c. 2, s. 4, which authorizes the issuing of the warrant of distress upon the appli-

cation of the overseers, authorizes it without a separate adjudication or order, then the warrant of distress must be taken to be both a judgment and a writ of execution. The rule of law is, that the *certiorari* should issue, in order to remedy any grievance arising from the judgment of inferior jurisdictions, where no writ of error would lie, although the party was entitled to appeal. That did not prevent a *certiorari* from issuing when the time for appealing had gone by (a). Although, by an action of trespass, the complainant might have redress for his injury, yet, till this adjudication was disposed of, it would be conclusive proof of all the facts stated therein, and therefore would prove that the defendant had been summoned, it being so stated in the warrant. The quashing of this warrant, therefore, was a necessary preliminary to bringing the action.

1831.

Ex parte
TAUNTON.

TAUNTON, J.—As there is no precedent for issuing a *certiorari* in such a case, it gives rise to a strong presumption, that this remedy does not extend to it. The statute of *Elizabeth* authorizes the issuing of the warrant, without any adjudication at all. It is the practice of all Justices to make no adjudication in those cases. The warrant is not different in any respect from ordinary warrants. It is not, therefore, conclusive proof of any of the facts stated in it. If it has issued without the fulfilment of any preliminary requisite, the party against whom it has issued may have a remedy by an action of trespass.

∴ Rule refused.

(a) 1 Salk. 147.

1831.

May 6th.

DOE *d.* THORN *v.* PHILLIPS.

On an application under the 1 *W. 4, c. 22, s. 4*, to have a witness, within the jurisdiction of the Court, examined on interrogatories, the name of the person before whom the examination is to take place must be mentioned, before the rule *nisi* will be granted.

THESIGER applied for a rule to shew cause why an order for the examination of a witness of the age of ninety-two years, resident at *Bath*, should not issue under the 1 *Wm. 4, c. 22, s. 4*, by which it was provided, "That it shall be lawful for each of the said Courts at *Westminster*, and also the Court of *Common Pleas* of the county palatine of *Lancaster*, and the Court of *Pleas* of the county palatine of *Durham*, and the several Judges thereof, in every action depending in such Court, upon the application of any of the parties to such suit, to order the examination on oath on interrogatories, or otherwise, before the Master or Prothonotary of the said Court, or other person or persons to be named in such order, of any witnesses within the jurisdiction of the Court where the action shall be depending, or to order a commission to issue for the examination of witnesses on oath at any place or places out of such jurisdiction, by interrogatories or otherwise, and by the same or any subsequent order or orders to give all such directions touching the time, place, and manner of such examination, as well within the jurisdiction of the Court where the action shall be depending as without, and all other matters and circumstances connected with such examinations as may appear reasonable and just (a)."

TAUNTON, J.—What is the name of the person before whom you move that the examination should take place?

Thesiger.—There will be no difficulty in agreeing as to some gentleman.

TAUNTON, J.—Yes, that may be, but the name must be mentioned before I can grant the rule.

(a) See 2 Dowl. Stat. 43.

On a subsequent day, in term, the name of a gentleman was mentioned, and the rule was granted accordingly.

1831.

DOE
d.
THORN
v.
PHILLIPS.

Rule granted.

PRESCOTT v. STEVENS.

May 6th.

HOGGINS moved for a rule to shew cause, why, in the case of two actions depending for the same cause, the plaintiff should not be at liberty to discontinue the first action as of *Hilary* Term last, or why the defendant's plea of the present term should not be taken off the file. In the first action, the process was serviceable; in the second, it was bailable. We have not discontinued, and the defendant pleads the pendency of the former action. In the case of *Bishop v. Powell* (a), Lord *Kenyon* was of opinion, that where the first process was serviceable, and the second bailable, the proceedings were regular (b).

If a plaintiff sues out serviceable process, and, without discontinuing, sues out bailable process for the same cause of action, the defendant may plead the pendency of the former suit, and the Court will not relieve the plaintiff.

TAUNTON, J.—The defendant has a right to plead the pendency of the first action. I cannot assist you.

Rule refused.

(a) 6 T. R. 616.

(b) See also *Heber* (an attorney) v. *Bishop*, Barnes, 169; and *Olmius* v. *Delany*, 2 Strange, 1216, where

the Court held, that a plaintiff might discontinue the first action, although he had proceeded bailably in the second.

1831.

May 7th.

The Sheriff is not bound to execute bailable process on which the place of abode and addition of the defendant are not indorsed, although, at the time of receiving the process, he made no objection to the want of indorsement.

KENRICK v. NANNEY.

TURNER shewed cause against a rule for discharging a rule, calling on the Sheriff of *Denbighshire* to return the writ issued against the defendant. The rule had been obtained on the ground, that the addition of the defendant had not been indorsed on the writ according to the rule 2 & 3 *Geo. 4, H. 1822*. The question is, whether the Sheriff is to be allowed to take advantage of this error now? He made no objection to receiving the writ at the time of its delivery to him, on account of the want of addition. He did not say that he should not be able to execute it. The only objection he made to it was, that under the 7 & 8 *Geo. 4, c. 71, s. 7*, a resident in *Denbighshire* could not be arrested for a less sum than 50*l.*, while the present writ was only indorsed for 20*l.* That objection is, however, removed by the 11 *Geo. 4 & 1 Wm. 4, c. 70, s. 13 (a)*. Now, in the case of *Clarke v. Palmer (b)*, where a *ca. sa.* was lodged with the Sheriff, and there was no description of the defendant's address or place of residence indorsed on the writ, Lord *Tenterden* said—"I by no means lay it down as a general proposition, that in all cases where a writ has been lodged by the plaintiff, without the indorsement required by the rule of Court, and the Sheriff has received that writ without objection, the Court will interpose, and set aside the writ." Here, no objection was made, and therefore it comes within the principle of *Clarke v. Palmer*.

Cottingham, contra, was stopped by the Court.

TAUNTON, J.—The Sheriff is not bound to go about the county to seek a party who is thus generally described.

(a) Sec 1 Dowl. Stat. 378.

(b) 9 B. & C. 153.

The object of the rule was to prevent the mistakes which might be made in consequence of so general a description. He is not bound to do any thing upon it, unless there is a good description of the defendant in the writ.

1831.
 KENRICK
 v.
 NANNY.

Rule absolute.

ANONYMOUS.

May 9th.

TALFOURD shewed cause against a rule, calling on the plaintiff to shew cause why the bail-bond should not be delivered up to be cancelled, and the plaintiff pay the costs of the application. In this case the plaintiff had sued out serviceable process. A summons for particulars was taken out, and an order made for them. This had the effect of staying proceedings. Two terms after the writ was sued out, he proceeded by arrest. This, he submitted, the plaintiff was perfectly entitled to do. He cited *Bishop v. Powell* (a), where a plaintiff sued out common process against the defendant, and, without discontinuing, he afterwards sued out a bailable writ, and delivered a declaration; and after that, and before plea, he obtained a side bar rule to discontinue the first action, on payment of costs. In that case Lord *Kenyon* said, that, as the first was not a bailable writ, the proceedings in that case were regular (b).

Where a plaintiff sued out serviceable process, and an order for particulars was made, and, two terms after suing out the serviceable process, he arrested the defendant:—*Held*, that the arrest was regular, although the order for particulars operated as a stay of proceedings in the first action.

TAUNTON, J.—In that case, the first action was discontinued before the application in the second, but not before the arrest.

(a) 6 T. R. 616.

(b) *Olmius v. Delany*, 2 Strange, 1216, in which the Court said, that, under certain circumstances, the defendant might be held to bail in

the second action, before the first was discontinued, although he had not been holden to bail in the first. See also *Tidd's Prac.* 174, 9th edit. and *ante*, p. 57.

1831.
ANONYMOUS.

Platt, in support of the rule, contended, that as the proceedings were stayed until the delivery of particulars, it was a contempt of the Judge's order for particulars, to issue this bailable process, and arrest the defendant. It was not, therefore, so much an irregularity, as a contempt of the process of the Court.

TAUNTON, J.—There is no case precisely like the present; but I have always understood the difference to be between serviceable and bailable process. The rule that *nemo debet bis vexari pro eadem causa* does not here apply, because the first process was serviceable. The only matter which arises in this case, to bring it at all within a different principle, is that which the plaintiff mentions, namely, that there was a stay of proceedings in the first action. At the same time, I doubt very much whether the Court can exercise the jurisdiction of directing the bail-bond to be delivered up to be cancelled on filing common bail, merely on that ground. I therefore think, that, on the authority of the case in 6 *Term Reports*, the justice of this case will be best satisfied by discharging this rule without costs, on the terms of the plaintiff undertaking to discontinue the first action, and delivering particulars.

Rule discharged.

END OF EASTER TERM.

Trinity Term.

IN THE FIRST YEAR OF THE REIGN OF WILLIAM IV.

ANONYMOUS.

1831.

May 23rd.

ARCHBOLD objected to the justification of a bail, who stated he was a lodger in *England*, but was a householder in *Scotland*, and possessed of money at his bankers' in this country to double the amount of the plaintiff's cause of action, after the payment of his debts.

A lodger in *England*, possessed of a house in *Scotland*, cannot justify as bail.

PATTESON, J., rejected him, and refused time to add another, on the ground that the defendant should have been aware of the fact, that the bail was not a freeholder or householder in this country.

Bail rejected.

WALKER v. ARLETT.

May 24th.

PLATT shewed cause against a rule obtained by *Richmond*, requiring Mr. *Henry Hamilton*, an attorney of the Court, to shew cause why he should not fulfil his undertaking for the debt of a person named *Arlett*, an attorney at *Ware*, in *Hertfordshire*. An action by bill had been brought against *Arlett*, for a sum recovered by him for one of his clients. *Arlett* gave a *cognovit*, but the money was not paid under it. *Arlett*, accompanied by *Hamilton*, went to the attorney for the plaintiff, and *Hamilton*

An attorney giving an undertaking for another, in a cause in which he is not concerned as attorney, will not be forced summarily to fulfil it; but the party to whom it is given will be left to his action.

1831.
WALKER
v.
ARLETT.

offered his undertaking for the debt. It was accepted, and the object of the present application was summarily to enforce that undertaking. It was true that *Hamilton* was an attorney and the general agent of *Arlett*; but he was neither agent nor attorney for him in the present instance. The undertaking was, therefore, the common guarantie by one person for another, on which he would be liable, if, by the Statute of Frauds, the parties were entitled to recover. In the case of *Bursell v. Jones and Another* (a), an action was brought, and successfully maintained, against two attorneys, on their undertaking on behalf of their clients. The fact of Mr. *Hamilton* being an attorney made no difference. The party must be left to his action.

Richmond appeared in support of the rule.

PATTESON, J.—It seems to me that this is a mere undertaking, which the Court ought not to interfere to enforce summarily. It is one on which an action would lie. The undertaking was not given professionally, as an attorney in the cause; for this was not one in which he was engaged, but one in which he acted merely as a friend. The rule must, therefore, be discharged, but without costs, as the undertaking ought to have been performed.

Rule discharged, without costs.

(a) 3 B. & A. 47.

1831.

DOE v. ROE.

May 24th.

WHITE moved for judgment against the casual ejector. The service was on the 19th of *May*, which, he submitted, was the day before the essoign day, according to the proper construction of the 11 *Geo. 4*, & 1 *Wm. 4*, c. 70, s. 6. That act provided (a), that *Trinity* Term should commence on the 22nd of *May*, and "that the first essoign or general return day shall be the fourth day before the commencement of the term, both days being included in the computation; the second essoign day shall be the fifth day of the term, the third shall be the fifteenth day of the term, and the fourth and last shall be the nineteenth day of the term; the first day of the term being included in the computation, with the same relation to the commencement of each term as they now bear, and shall be distinguished by the day of the term on which they respectively fall, the *Monday* being in all cases substituted for the *Sunday*, when it shall happen that the day would fall on *Sunday*." Now *Trinity* Term properly beginning on the 22nd, and that day being a *Sunday*, it must commence on *Monday* the 23rd, and then the essoign day being the fourth day before the term, both days inclusive, must be *Friday* the 20th; and, therefore, *Thursday* the 19th must be the day before the essoign day. Mr. *Tidd* (b), in his supplement, was of opinion that *Monday* was the first day of the term. That opinion supported the view he had taken. Several other declarations in ejectment had been served under the impression that this was the right construction of the act. It was also the opinion prevailing in many of the offices.

By the operation of 1 *W. 4*, c. 3, s. 1, on the 11 *Geo. 4*, c. 70, s. 6, the first day of *Trinity* Term is the 22nd of *May*, even though that day of the month falls on a *Sunday*. Consequently, the essoign day, by s. 2 of the former act, is the 19th of *May*.

PATTESON, J.—Yes, that would be the rule according to the 11 *Geo. 4* & 1 *Wm. 4*, c. 70, s. 6, but since that

(a) See 1 Dowl. Stat. 371.

(b) Page 206, Appendix, note (b).

1831.

DOZ
v.
ROZ.

act the 1 *Wm.* 4, c. 3, has been passed. That statute, in the first section (a), proceeds—"Whereas, by an act passed in the last session of Parliament, intituled 'An act for the more effectual administration of justice in *England* and *Wales*,' it was, amongst other things, enacted, that the essoign and general return days of each term should, until further provision be made by Parliament, be as follows, that is to say, the first essoign or general return day for every term shall be the fourth day before the day of commencement of the term, both days being included in the computation; the second essoign day shall be the fifth day of the term; the third shall be the fifteenth day of the term; and the fourth and last shall be the nineteenth day of the term; the first day of the term being already included in the computation, with the same relation to the commencement of each term as they now bear, shall be distinguished by the day of the term on which they fall, the *Monday* being in all cases substituted for the *Sunday*, when it shall happen that the day would fall on *Sunday*, except always that in *Easter* Term there shall be four returns instead of five, the last being omitted." It then proceeds to repeal the whole of that portion of the previous act which it has recited, and makes no provision for cases in which the day of a term's commencing shall fall on a *Sunday*. The provision of 11 *Geo.* 4 & 1 *Wm.* 4, c. 70, s. 6, directing *Trinity* Term to commence on the 22nd of *May*, remains in force. The 1 *Wm.* 4, c. 3, s. 2, provides that the first essoign or general return day shall be the third day exclusive before the commencement of each term. That makes the essoign day of the term the nineteenth. I am myself of opinion that the service is clearly bad, and such, I believe, is the opinion of the other Judges. The question as to which is the essoign day is now before the other Courts. I shall meet the other Judges on *Wednesday*,

(a) See 2 Dowl. Stat. 6.

and I will consult with them on the subject, and let you know the result of my inquiries on *Thursday*.

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Cur. adv. vult.

On *Thursday*, in the course of the day, the opinion of the Judges was communicated by—

PATTESON, J.—I have spoken to the other Judges, and we are clearly of opinion that *Sunday* was the first day of the term, and, consequently, the essoign day was the 19th. Declarations in ejectment, therefore, which were served on the 19th, are irregular. But, as that bad service has arisen from a mistake, which has extended to some of the offices, the Court will relieve all persons who have served declarations on that day, as the necessity for serving declarations in ejectment depends on a rule of our own Court. We have, therefore, determined that those persons who have so served their declarations shall have judgment against the casual ejector, but shall not sign their judgment until they have served their rule for judgment on the tenant in possession, in order to enable him to come here if he thinks fit. The rule will be served three days before signing judgment in town causes, and six days in country causes. We, however, do not do this to enable parties to come in and shew cause, on the ground that the service was on the 19th instead of the 18th, and that we should discharge the rule on that ground; quite the contrary: but we direct this service of the rule merely to prevent the tenant in possession from being taken by surprise. In the case in which Mr. *White* moved, therefore, the rule for judgment must be served before judgment is signed.

A similar course was pursued in several other cases of ejectment, in which judgment against the casual ejector had been moved for, which were waiting the determination

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of the Court as to the real essoign day, as also in others moved afterwards.

PATTESON, J., at the rising of the Court, intimated to the bar that it would be important for them to know, that the Court had determined, that, in the case of essoign declarations, not in ejectment, which were not delivered or filed till the 19th of *May*, the essoign day, the defendant would not be entitled to imparl to *Michaelmas* Term. If the defendant imparled, he imparled at his own peril; but he, for one, should not make any order for an imparlance.



May 24th.

Ex parte WHITE.

The Court will discharge a debtor who has lain in prison for the space of twelve successive calendar months, for a debt not exceeding 20*l.*, under the 48 *Geo.* 3, c. 123, s. 1, although he has been brought up under the compulsory clauses of the Lords' Act, and has refused to deliver in his schedule.

B. ANDREWS applied for the discharge of a debtor under the 48 *Geo.* 3, c. 123, s. 1, who had remained in execution for the space of twelve successive calendar months, for a debt not exceeding 20*l.* The debt amounted to 10*l.* for damages recovered in an action against the prisoner. The usual notice had been given, and, therefore, he was entitled to his discharge as a matter of course (a).

Kelly shewed cause.—The defendant had been brought up under the compulsory clauses of the Lords' Act. He had demanded his sixty days to deliver in his schedule, but

(a) It is to be observed that the practice of the *King's Bench* and *Common Pleas* differs as to whether the rule for the order of discharge under the above act shall be absolute, or *nisi*, in the first instance. In the *King's Bench* it is absolute in the first instance, after giving due notice. *Davis v. Ro-*

gers, 4 D. & R. 361; 2 B. & C. 804, S. C. In the *Common Pleas*, it is only a rule *nisi* in the first instance. *Ex parte Neilson*, 7 Taunt. 7; *Magnay v. Gilkes*, 7 Taunt. 467. No change is effected on this point by the Rules of *Hilary* Term, 2 Will. 4.

had not delivered it in. He was therefore liable to transportation for seven years. Until he had complied with those provisions of the Lords' Act under which he was brought up, he could not be entitled to his discharge under this act.

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B. Andrews, in support of the rule, cited *Ex parte Cusac* (a), in which it was holden in the Court of *King's Bench*, that this clause is compulsory on the Court, and that the Court has no power to compel the defendant to make a schedule or assign his property, he having duly applied under the provisions of this act, although the creditor on the same day duly brought up the defendant under the compulsory clauses of the Lords' Act. The Court said, that, where the original debt was under 20*l.*, and the defendant had been in prison more than a year, he is absolutely entitled to his discharge without qualification, except under the act against the estate. He also cited *Langdon v. Rossiter* (b), and *Wood v. Kelmerdine* (c), in which the same point arose. The defendant's whole property is still liable, and he may be transported. But he is entitled to his discharge now.

PATTESON, J., made the rule absolute for an order for his discharge.

Rule absolute.

(a) 1 Chit. Stat. 589. (b) 13 Price, 186. (c) 2 Y. & J. 10.

DOE v. ROE.

May 24th.

STARKIE moved for judgment against the casual ejector, the service being on the wife of the tenant in possession, in a shed where the husband carried on his business,

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but not forming a part of the premises sought to be recovered, but closely adjoining them.

PATTESON, J.—That, under the circumstances, is sufficient service.

May 25th.

ANONYMOUS.

A demand of plea cannot be served on a defendant not an attorney, by sticking it up in the *King's Bench* office.

CRESSWELL, C., moved for a rule to shew cause why the demand of plea in this case should not be served on the defendant, by sticking it up in the *King's Bench* office, and leaving a copy at a public house, which he was in the habit of frequenting. The defendant had been arrested. The declaration was served upon him in custody. He gave a *cognovit* for the debt and costs, which, being executed without the presence of an attorney on his behalf, was void. He was set at liberty; and when it was perceived by the party that the *cognovit* was void, time was given to him. He kept out of the way, and there was no possibility of serving him with a demand of plea. The application, therefore, was, that it might be served by sticking up the demand in the *King's Bench* office, and leaving a copy at a public house, which he was in the habit of frequenting.

PATTESON, J.—Are you aware of any such application as this having been granted by the Court?

Cresswell, C., admitted that he was not.

PATTESON, J.—He is not an attorney of the Court, and therefore is not bound to be in Court. The defendant here is allowed to go where he pleases, and, therefore, I cannot make this good service.

Rule refused.

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May 25th

EVANS, JOSHUA, applied for the discharge of an insolvent debtor under the 48 Geo. 3, c. 123, on the ground of his having remained in execution for the space of twelve months for a sum not exceeding 20*l*.

A defendant remaining in execution twelve successive calendar months, for the nominal damages in ejectment, is entitled to his discharge under the 48 Geo. 3, c. 123, s. 1, although the property recovered in the action is of considerable value.

Addison opposed the application, on the ground that the case did not come within the meaning of the act. The applicant had been taken in execution for the nominal damages in an action of ejectment. The damages were merely nominal, and, therefore, below the sum of 20*l*.; but the property recovered by the verdict was worth much more, and, therefore, the defendant was not entitled to her discharge.

PATTESON, J.—The sum for which the party is in execution is that to which we are to look, according to the language of the act. Now, the defendant has been in custody for more than twelve months, for a sum less than 20*l*., and therefore is entitled to her discharge under the statute.

Rule granted.

DRAZ v. SCROUPE.

June 2nd.

BARSTOW moved for a rule to shew cause why certain bills, to the amount of 2,500*l*., delivered by an attorney named *Cory*, to the plaintiff, Mr. *Draz*, by whom he had been employed, should not be referred to be taxed by the Master. There were five bills delivered, three were paid by Mr. *Draz* without being referred to the

A special agreement between an attorney and his client as to the amount of the charges of the former is not binding on the Master on taxation; but the Master may exercise his dis-

cretion under all the circumstances of the case, and make an allowance even to the amount stated in the special agreement.

Semble, an attorney ought himself to peruse a title on the part of his client, before he sends it for counsel's opinion.

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Master for taxation. The object of the present application was, that those bills should be referred to the Master for taxation, and that the Master might review his taxation of the two last. His objections to the Master's taxation were three—*First*, the Master allowed to Mr. *Cory*, in respect of all journeys taken by him, at the rate of five guineas a-day, besides his expenses. The usual allowance was two guineas a-day.

TAUNTON, J.—In that, the Court cannot interfere, because, on the subject of those charges, he is, for common purposes, the sole judge.

Barstow.—I know that, in general, the Court do not interfere in matters of detail. But it is to the principle of the Master's taxation that I object. It is contended, and I may admit it, that a special agreement was made between Mr. *Cory* and Mr. *Drax*, that the former should be allowed five guineas a-day, besides his expenses, for all journeys. But any agreement of that kind cannot be allowed in point of law. It is laid down by Mr. *Tidd* (a), that "an attorney's bill may also be taxed, though there was a special agreement between the attorney and his client, that the former should be paid for his time at a certain rate by the day, besides his expenses."

TAUNTON, J.—Mr. *Tidd* only says that the bill may be taxed, but he does not shew what the rate of allowance is to be.

Barstow.—Yes, but that must be in order to reduce it to the usual rate. For it would be idle to send it to be taxed by the Master, if he was to be bound by the agreement. Now, the difference here from the usual rate of charge is two or three hundred pounds in the amount of these bills.

(a) 1 *Tidd's Practice*, 333, 9th edit.

It would be most mischievous, if an attorney, when a summons was taken out to tax his bill, should be able to say, before a Judge at chambers, that there was a special agreement between him and his client, and, therefore, the Master could not interfere.

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TAUNTON, J.—Then it would be open for the client to say, that there was no such agreement.

Barstow.—Then I must rest my argument on the authority of *Mr. Tidd*, that an attorney's bill may be referred for taxation, although a special agreement exists as to the amount of the attorney's remuneration; and, as it would be of no advantage whatever that a bill should be referred to taxation, if the Master were to be bound by a special agreement, I submit it must be reduced to the usual scale. My second objection is, that there was a charge for perusing an abstract of a title nearly to the amount of 50*l.*, a copy for counsel 54*l.*, and a fee to counsel and clerk 57*l.* 15*s.* *Mr. Drax's* objection to those charges is to that for the perusal by the attorney; as the title was not accepted on his responsibility, but on that of the counsel, whose fees were also charged. No responsibility, therefore, was incurred by the attorney, but he transferred his responsibility to the counsel. *Mr. Drax*, therefore, had no advantage from the consideration bestowed by the attorney.

TAUNTON, J.—Yes, he had, because the attorney peruses it, and, when he has perused it, he thinks that he ought to have the opinion of counsel. He would have been much more to blame if he had sent it at once to counsel for his opinion.

Barstow.—*Thirdly*, he objected to the allowance by the Master of a copy of the abstract of title. His objection was twofold—*First*, he contended that the Master should not have allowed for the copy at all;—*Secondly*, if a copy

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were allowed, he should have allowed the full amount of the copy, and not the stationer's charge for a copy only. With regard to the first point, the non-allowance of a copy at all, he should cite Sir *E. Sugden's* book on *Vendors and Purchasers* (a); Sir *Edward* had collected the cases there, and the conclusion he had drawn from them was this—"As to the general property in the abstract, it is hard to say who may have it; while the contract is open, it is neither in the vendor nor in the vendee absolutely; but, if the sale goes on, it is the property of the vendee; if the sale is broken off, it is the property of the vendor. In the meantime the vendee has a temporary property, and a right to keep it, even if the title be rejected, until the dispute be finally settled, for his own justification, in order to shew on what ground he did reject the title." Sir *Edward* then proceeded—"In a case where a purchaser returned the abstract to the seller, to ask the queries and opinion of counsel, it was held, that he (the purchaser) might maintain *trover* against the seller for the abstract, although the seller himself might ultimately be entitled to the abstract. The temporary property of the purchaser in the abstract was sufficient to enable him to maintain the action." For this *dictum* he cited the case of *Roberts v. Wyatt* (b). The property in the original abstract being in the vendee, his own client, it was not at all necessary for him to have a copy of the abstract. The Master should not, therefore, have allowed for a copy of it. But the Master had pursued a medium course, and had allowed a stationer's copy of the abstract. That brought him to the second branch of his third objection, which was, that he should either have allowed all or none.

His objections to the bill were, therefore—*first*, that the special agreement was bad, in point of law;—*secondly*, that the charge for perusing by Mr. *Cory*, previous to sending it to counsel, ought not to have been allowed;—

(a) Page 386

(b) 2 Taunt. 268.

and *thirdly*, that the allowance of the copy of abstract was equally objectionable.

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TAUNTON, J.—You may take a rule to shew cause.

This rule was granted at the latter end of *Easter Term*, and cause shewn against it in *Trinity Term*, before Mr. Justice *Patteson* in the *Practice Court*. He took time to consider, and then stated that he had communicated with the other Judges of the *King's Bench* on the point, and they were of opinion, that the question, whether a special agreement by a client to pay at a certain rate would bind the Master on taxation, was of so much importance, that the case ought to be argued before the full Court.

On *Tuesday, 24th May*—

Follett shewed cause against the rule.—He understood that Mr. *Barstow* had abandoned his objections to any other parts of the bill except those which depended on the special agreement between Mr. *Drax* and Mr. *Cory*.

Barstow admitted that the sole question was, as to the special agreement.

Follett.—He should not contend that an agreement between the client and the attorney would bind the Master in the charges he should allow on taxation. But he should submit, that, under the special circumstances of this case, the allowance made by the Master was perfectly correct. It was true, that the Master generally allowed only two guineas a day to the attorney while engaged on journeys. That, however, did not prevent the Master from making any allowance, even to the amount of five guineas a-day, if he thought proper. The whole of such matters were

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in the Master's discretion; and, as there was no proof that his discretion had been controlled by the special agreement between the attorney and his client, there was no reason for disturbing the taxation of the Master.

Barstow, contra.—Allowing that there was an agreement between Mr. *Drax* and Mr. *Cory*, that the latter should receive five guineas instead of two guineas a-day, the case stands thus:—A person, ignorant of law charges, is a client to an attorney. The client says—“What are your charges? I do not like to employ any one unless I know what I have to pay.” The attorney tells him what are his charges; but he does not inform the client that he charges at a higher-rate than others. Does he say—“Sir, I cannot give my attention for the same remuneration as others will: I must have five guineas a-day; but the regular charge is two guineas?” He does not. Not a word passes from which the client may not suppose that the charges stated to him are the regular charges. The client goes on, relying entirely on the honour of the attorney, not knowing whether the charges are regular or not. Now, is this such a special agreement between attorney and client, as the Court, in favour of the attorney, will countenance? I submit that no attorney can be allowed to set up such an agreement, to prevent the bill from being taxed. I submit that no attorney ought to make such an agreement. It is illegal. I need not remind the Court of the very proper jealousy shewn by all the Courts, as to contracts between attorney and client for the benefit of the former. In the Courts of equity, the solicitor must not take a gift from his client, nor make a purchase from him (a). If this were not so, there would be no bounds to the influence of an attor-

(a) *Watt v. Grove*, 2 Sch. & Lef. 503; *Harris v. Tremeneere*, 15 Ves. 40, 41; *Montesquieu v. Sandys*, 18 Ves. 308, 313; *Bellew v. Russell*, 1 Ba. & Bea. 105. See also 1 Hovenden on Frauds, 28, 29.

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ney. Could such a contract be allowed, it would be set up every day. When a party came to a Judge's chambers to apply for a summons to tax costs, the attorney would say—"You cannot tax, because there is a special agreement between my client and myself." If an attorney has received money from his client, he may say—"I have a bill to equal amount, by reason of a special agreement." And the Court can lay down no rule, can fix no arbitrary sums, which shall be considered as evidence of fraud by the attorney upon the client. Will the Court, then, enter into an inquiry, in each particular case, as to whether the defendant did or did not exercise undue influence in procuring such an agreement? That would be a material question in almost every case. But, should the agreement itself be disputed, how will its existence be tried? By affidavit, in the Master's Office, or by issue? These are questions worthy of consideration, when so novel and monstrous a doctrine is advanced. But, how does the act of Parliament, 2 Geo. 2, c. 23, admit of this? That statute must now have an implied qualification. The language of it must now be, "shall deliver a bill," (if there be no special agreement to the contrary). Then, upon the trial at *Nisi Prius*, instead of proof of a delivery, proof will be given of a special agreement. It will, in fact, be almost a repeal of the act of Parliament. But, on what foundation does this doctrine rest? Mr. *Tidd* (b) lays it down, that "an attorney's bill may be taxed, although there was a special agreement between the attorney and his client, for the time, at a certain rate by the day, besides his expenses." For this *dictum* he cites *Sayer on Costs*, p. 321, and 4 *Brown's Chancery Cases*, p. 350; and then he adds, in his note, a case in *Barnardiston*, *contra*. That case is to be found in 2 *Barnardiston*, p. 164, *Trinity*, 5 Geo. 2, 1732, and is anonymous. The case was this:—"In an ac-

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tion brought by an attorney, for fifty guineas, upon a special promise of the defendant, for business done in his profession, Mr. *Hussy* moved, that it might be referred to the Master, to see what was due; and, upon paying the same, all proceedings might be stayed. The Court said, 'As this action was founded upon a special agreement, they could do nothing in it.' Accordingly, the motion was refused." In this case, the bill might have been incurred before the act 2 *Geo. 2*, c. 23, was passed; for there was no date in the case, to ascertain at what time it was incurred, and there is no allusion made to the statute. But, in the case of *Walmesly v. Booth* (a), Lord *Hardwicke* observed—"Attornies and solicitors, especially since the late act of Parliament, 2 *Geo. 2*, c. 23, have been considered as officers of justice, and they have stated fees allotted to them, which they ought not to exceed; and therefore, in all Courts, but more especially in Courts of law, there are certain rules regulating their behaviour with regard to their clients." In *Newman v. Payne* (a), which was decided while Lord *Loughborough* was Chancellor, the marginal note is this:—"An attorney cannot take from his client a bond for unliquidated costs. Notwithstanding such bond and a mortgage has been given, the bills may be taxed, and, upon payment, the defendant to re-convey, and the bond declared void." Lord *Loughborough* said—"Bills of costs cannot be of an arbitrary amount, but must be such as are liable to be ascertained. They cannot be so settled as not to be open to examination." In the Anonymous case quoted by Mr. *Tidd*, from Mr. Serjeant *Sayer's* book on Costs, p. 321, 32 *Geo. 2*, it appeared, that an attorney agreed with his client to be paid at a certain rate by the day, and likewise to be allowed the expense of a post-chaise; the question was, whether the client should be bound by the agreement. It was

(a) 2 Atk. 27, 1741.

(b) 4 Bro. C. C. 350; 2 Ves. jun. 199.

holden he should not; and the attorney's bill, in which there were charges conformable to the agreement, was referred to be taxed. In the case of *Balme v. Paver* (a), a party under a bond of indemnity for the costs of another, had, on a compromise, paid what the solicitor stated to be the amount of them. He applied afterwards, although he was not the client, to have those costs taxed. Lord Eldon said—"There is nothing that ought to be granted with so much jealousy as the right of suitors to have these bills of costs taxed. At the time of the agreement, the defendant had a right to have the bills taxed; and it is interposed as one of the terms upon which the suit was to be terminated, that they should not be taxed. Now, I am of opinion that such a condition is good for nothing. The Court will not permit a party to say, the suit shall not be put an end to, unless the other agrees not to tax the bill of the solicitor." In *Scougall v. Campbell* (b), the bills had been paid, and, after a delay of some time, an application was made to tax them. Lord Eldon, C., there observed—"In reference to a topic which has been alluded to in the argument, I will say, that, if any solicitor tells a client beforehand, that he will not undertake his business if his bill is to be taxed; or, if any solicitor, in the progress of a cause, gives his client to understand that he will go on with it, or not go on with it, according as his bills are to be taxed or not to be taxed, I think it my duty to say, that the Judges of the land will not permit him to be a solicitor in any other cause. I do not believe any Judge would allow a solicitor who has so acted to continue on the roll; and I will not permit it to be intimated, that a solicitor will act if his bills are not to be taxed, but will not act if they are to be taxed." I shall submit, that the agreement was illegal, as being contrary to the act of Parliament, and contrary to the authorities. But it requires no

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(a) Jacob's Reports, 305.

(b) 3 Russ. 545.

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authority to shew, that no attorney ought to make such an agreement, or seek to make it; for, every received principle of our law is against a state of things which would operate as a strong temptation to an attorney to abandon his duty in the commencement of his office, by driving a bargain, which he might wring up to any amount, according to the necessity or urgency of his client's situation.

LORD TENTERDEN, C. J.—An agreement between an attorney and his client, on the subject of costs, would not be binding on the Master; and if it were sworn here, that the Master, in taxing the bills, considered himself bound by the agreement, I should have thought that he ought to have reviewed his taxation. There is, however, no affidavit to that effect. The Master has a right to exercise his discretion in matters of detail, under all the circumstances of each case; and, if he has acted here according to his discretion, I see nothing in the facts laid before the Court, which should induce us to interfere, to make him review what he has done.

LITLEDALE, J.—As a general principle, I do not think effect ought to be given to these agreements between attorney and client. But it is open to the Master to inquire into the particular circumstances of the case, and say what he ought to allow.

PARKE, J.—It appears to me, that agreements of this sort ought to be viewed by the Court with very great jealousy. As it does not appear that the Master thought himself bound by the agreement, but that he exercised his discretion as to the amount of charges he ought to allow, I think we ought not to interfere.

TAUNTON, J., concurred.

Rule discharged, without costs.

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June 3rd.

DOE v. ROE.

(Before the four Judges.)

MILNER moved for judgment against the casual ejector, under the 11 *Geo. 4* & 1 *Will. 4*, c. 70, s. 36. The words of the section are—"That in all actions of ejectment, hereafter to be brought in any of his Majesty's Courts at *Westminster*, by any landlord against his tenant, or against any person claiming through or under such tenant, for the recovery of any lands or hereditaments, where the tenancy shall expire, or the right of entry into or upon lands or hereditaments shall accrue to the landlord, in or after *Hilary* or *Trinity* Terms respectively, it shall be lawful for the lessor of the plaintiff in any such action, at any time within ten days after such tenancy shall expire, or right of tenancy accrue as aforesaid, to serve a declaration in ejectment, intituled of the day next after the day of the demise in such declaration, whether the same shall be in term or in vacation, with a notice thereunto subscribed, requiring the tenant or tenants in possession to appear and plead thereto within ten days, in the Court in which such action may be brought; and proceedings may be had on such declaration, and rules to plead entered and given, in such and the same manner, as nearly as may be, as if such declaration had been duly served before the preceding term." Here, however, the right of the landlord did not accrue until the 20th of *May*, which was the day after the essoign day of *Trinity* Term; now, the essoign day, and the intermediate days between it and the first day in full term, were for some purposes part of the term. The right of the landlord must, therefore, be taken as having accrued within *Trinity* Term; and the declaration, which had been delivered within the term, complying with the directions of the above statute, was regular, and therefore the lessor

Where a landlord's right of possession accrues on the day after essoign day of *Trinity* Term, he is not entitled to serve a declaration in ejectment as of that term, under 11 *Geo. 4* & 1 *Will. 4*, c. 70, s. 36.

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of the plaintiff was entitled to judgment of *Trinity Term* against the casual ejector.

PARKE, J.—By the 6th section of that act term began on the 22nd of *May*; and therefore the right of the landlord, in this case, did not accrue during *Trinity Term*; and therefore the statute does not apply.

Milner.—The landlord will, therefore, be driven over to *Michaelmas Term*, because, by the rule of Court, all declarations in ejectment must be served before the essoign day, or the plaintiff will not be entitled to judgment of the term (a).

LORD TENTERDEN, C. J.—Those three days are a *casus omissus* in the statute, and therefore we cannot interfere.

Rule refused.

(a) *Roe d. Bird v. Doe*, Barnes, 172; 2 Tidd, Prac. 1210, 9th ed. According to the new rules of *Trinity Term*, 1 Wm. 4, however, the plaintiff will not in such a case be driven over to *Michaelmas Term*; for, by Rule 11, declarations in ejectment may be served before

the first day of any term, and thereupon the plaintiff shall be entitled to judgment against the casual ejector, in like manner as upon declarations served before the essoign, or first general return day. 1 Dowl. Stat. 387, and 2 Id. 7, 8.

PAPER BOOKS.

June 6th.

PATTESON, J., stated, that the Judges of the *King's Bench* had agreed, with respect to the delivery of Paper Books, that it would only be necessary, for the future, to deliver them to the Lord Chief Justice and the three senior *puisné* Judges sitting in the other Court. If the fifth Judge should require them, he would obtain them from one of the other Judges, as might be arranged between them.

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ANONYMOUS.

June 8th.

BAYLEY moved for a *distringas* against the goods of a Peer. The summons had been left at his house, when the officer serving it was informed by a servant that his Lordship was in *France*. The Sheriff was, therefore, in some doubt as to whether that was a sufficient service.

Service of a summons on a Peer, at his residence, when he is absent in *France*, is sufficient.

PATTESON, J.—The service will do, whether it be personal, or by leaving the summons at the Peer's dwelling-house, or at his last place of abode. This service being at his house, from which he was temporarily absent, must suffice (a).

Distringas granted.

(a) See 2 Crompt. 138, 3rd edit.; 1 Tidd, Prac. 118, 9th edit.

Ex parte M'CLELLAN.

June 9th.

JEREMY shewed cause against a rule obtained by *V. Richards*, why a *habeas corpus* should not issue to bring up a female infant of tender years, named *Eliza M' Clellan*, from the custody of her mother, in order to her being returned to the care of a schoolmistress, where she had been placed by her father. The application was made at the instance of the father. There was no suggestion, in the affidavits on which the rule had been obtained, that the child was subjected to improper restraint or confinement. The present application was made under the 56 *Geo. 3*, c. 100, s. 1, which was an extension of the act of the 31 *Car. 2*. The principle of the statute was to give jurisdiction to the Courts to relieve the subject from a state of illegal or

The Court will remove a child from the custody of the mother to that of the father, although there is no suggestion that the child is subjected to any improper confinement or restraint, nothing being shewn to prove that the custody of the father is improper.

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improper restraint. The Court, therefore, has only authority to interfere, in those cases where it shall appear that the party whom it is sought to release is in a state of illegal and improper restraint. I do not mean to deny that the father is legally entitled to the custody of his child. If it shall appear that the party is subjected to illegal and improper restraint, the Court will relieve; and, if the party has not legal discretion, the Court will then determine what custody is most safe, in which he should remain. This is the principle to be deduced from all the cases. In the case of *R. v. Sir Francis Blake Delaval* and others^(a), which was an application for a *habeas corpus* to be directed to him to produce *Ann Catley*, a girl of eighteen years of age, Lord *Mansfield* said—"In cases of writs of *habeas corpus* directed to private persons to bring up infants, the Court is bound, *ex debito justitiæ*, to set the infant free from an improper restraint; but they are not bound to deliver them over to any body, nor to give them any privilege. This must be left to their discretion, according to the circumstances that shall appear before them." That being the result of Lord *Mansfield's* judgment on all the cases, if the Court shall see that there is no circumstance in this case to require the exercise of this discretion, to remove the child from its present custody, it will not be disposed to give it over into the care of the father. Mr. Justice *Blackstone*, in the third volume of his *Commentaries*, p. 143, says, that, "before the abolition of the tenures in chivalry, it was a doubt whether an action would lie for taking and carrying away any other child besides the heir; some holding that it would not, upon the supposition that the only ground or cause of action was losing the value of the heir's marriage; and others holding that an action would lie for taking away any of the children, for that a parent hath an interest in them all, to provide for their

(a) 3 Burr. 1434.

education." For that proposition, he cites *Cro. Eliz.* 770. Mr. Justice *Blackstone* then continues—"If, therefore, before the abolition of these tenures, it was an injury to the father to take away the rest of his children as well as his heir (as I am inclined to think it was), it still remains an injury, and is remediable by writ of ravishment." If the Court is satisfied, in the first instance, that this child is under no illegal or improper restraint, it will not interfere, although the father may have this right over his child; but it will exercise its own discretion, as to whether it will interfere or not. I have already observed that no suggestion is made by the other side, that the child is subjected by its mother to any improper restraint; in addition to this negative proof of the good conduct of the mother, I have the affidavit of *Dame Pullen*, who states that *Mary M'Clellan*, the mother of the child, lived with her for a considerable time as her housekeeper; that the mother came to have possession of the child in consequence of its being afflicted with a scrofulous complaint while at a school, at which the father had placed her; that, in consequence of that complaint, and the fact of two others of her children having died of it, she had taken the child from the school; that the child is in a very delicate state of health, and requires very great care and attention; that it has been for some time under the mother's care at *Dame Pullen's* house; and that, during the whole of that period, the treatment by the mother of her child was most kind and attentive. I hope the Court will, under these circumstances, think it right that the child should not be delivered over into the care of the father.

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V. Richards was stopped by the Court.

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PATTESON, J.—I understand Mr. *Jeremy's* argument against the restoration of the child to its father to be—*first*, on the ground that this Court does not interfere, by *habeas corpus*, to take an infant out of the custody of any one, unless something like force or improper restraint of the person exists—and, *secondly*, under the peculiar circumstances of this case, the Court will not be disposed to interfere. As to the first ground, I think the authorities do not warrant the objection. The law is perfectly clear as to the right of the father to the possession of his legitimate children, of whatever age they be. In the case of *R. v. De Manneville (a)*, the Court held that the father of a child is entitled to the custody of it, though an infant at the breast of its mother, if the Court see no ground to impute any motive to the father injurious to the health or liberty of such a child, as by sending it out of the kingdom; the father being at the time an alien enemy, domiciled in this kingdom, and the mother being an *English* woman, and apprehensive only that he meant to send the child abroad, but assigning no sufficient reason for such an apprehension. With respect to the argument, that some force or improper restraint must be used, in order to authorize the Court in removing an infant from the custody of any one, the authorities referred to shew that it is not necessary that any force or restraint should exist on the part of the person having the custody of the infant towards it; but there must be some force or improper restraint on the part of the father, in order to enable the Court to take it from him. It appears, in the cases, that the Court of *King's Bench* has no authority to take the child from the father, unless it is shewn that the child has some improper restraint put upon it. I do not mean to say, that the Court has any power in such a case. It is laid down in *Blisset's case (b)*, that

(a) 5 East, 221.

(b) Loft, 784.

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the Court has a power to change the custody of the child, and to take it from the father. That is the strongest case to be found, as to the authority of this Court in similar instances. But that case was doubted a good deal by the Court of *Common Pleas*, in the case of *Ex parte Skinner*, an infant (a); in which case the Court doubted its authority so to interfere. I do not mean to say that this Court has not authority so to do. It is not necessary to say to what extent that case is an authority. It is not pretended that the child has been ill treated by the father. I am, therefore, left here to say, whether this Court can refuse to restore to the father the custody of his child, to which he has a general right, on the ground stated in these affidavits. The Court of *Chancery* has said, that the Court of *King's Bench* has an authority to restore a father to his rights; but that the Court of *King's Bench* has no power to compel a father to perform his duty. The Court of *Chancery* may exercise that power, but we cannot; we are bound to enforce the father's right. There is no instance of the *King's Bench* having taken the custody of the child from the father, on the ground of improper instruction. It was the House of Lords (b) who determined, that, for the sake of the education of the child, they felt bound to take the custody of it from the father. But, there, they distinguished the right of the Lord Chancellor to interfere from that of the Court of *King's Bench*. If there is any thing to shew that the child will be improperly educated, an application may be made to the Court of *Chancery*.

Jeremy begged to call the attention of his Lordship to the case of *R. v. Middleton* (c), where a husband claimed the custody of his wife, and the Court refused to interfere.

(a) 9 Moore, 278.

(b) *Wellesley v. Wellesley*, 2 Bligh, 124.

(c) 1 Chit. Rep. 654.

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PATTESON, J.—That is a different thing. In that case, the Court said that they would leave the wife to go where she thought fit, because the husband has not such a right to the custody of his wife's person, as the father has to that of his child. A wife may exercise some judgment and discretion, but a child cannot; and the Court will not interfere, where, as in the present case, there is nothing suggested which leads one to suppose that any ill usage has been exercised by the father, or by the schoolmistress with whom he wishes his child to be placed. I feel myself, therefore, bound to say, that the child must be delivered up to Miss ———, whom the father has named. It might be better, as the child is in a delicate state of health, that it should be with the mother; but we cannot make any order on that point.

Rule absolute.

June 9th.

KAY v. MASTERS.

Where a debtor applied to take the benefit of the Insolvent Act, and one of his creditors, an attorney, by threats of opposition, obtained from him promissory notes for the amount of his debt, and the creditor afterwards indorsed one of them to a *bond fide* holder, without notice of the circumstances under which it had been obtained; the debtor was afterwards arrested on the note, and he gave a bail bond—the Court directed the bail bond to be delivered up to be cancelled, on filing common bail; but refused to make the attorney deliver up the other notes, though part of the debt for which they were given was work and labour done as an attorney, the notes having been obtained in his character of creditor and not of attorney.

FOLLETT shewed cause why a bail bond should not be delivered up to be cancelled on filing common bail, and why a Mr. King should not deliver up certain notes drawn by the defendant in his favour. The facts of the case, as they appeared in the affidavit of the party making the application, were these: The defendant some time ago became indebted to Mr. King, who is an attorney, in a considerable sum for work and labour as an attorney, and also for money lent. The defendant having been arrested, he determined to take the benefit of the Insolvent Act, and for that purpose gave the necessary notices. Mr. King intimated that he intended to oppose the defendant's discharge. In order to induce Mr. King not to oppose him, the defendant gave him several promissory notes for the debt

due from the defendant to him, and which debt was introduced into his schedule. Mr. *King* did not oppose him, and the defendant was discharged. On one of the promissory notes, which had been so given by the defendant to *King* while in prison, the defendant was now in custody at the suit of the plaintiff, to whom *King* had indorsed it without notice, and for a valuable consideration. He submitted, that, as the note was not in the schedule of the defendant, he was not discharged from it by the Insolvent Act, 7 *Geo.* 4, c. 57, s. 60. The words of the section are: "That no person who shall have become entitled to the benefit of this act by any such adjudication as aforesaid, shall at any time hereafter be imprisoned, by reason of the judgment as aforesaid entered up against him or her according to this act, or for or by reason of any debt or sum of money or costs, with respect to which such person shall have become entitled." The question for the determination of the Court, therefore, was, what meaning ought to be attached to the word "debt." The debt here between the plaintiff and defendant, and which the plaintiff sought to recover, was the promissory note, and not the debt from which the defendant had been discharged under the Insolvent Act. From the debt on the note, the defendant could not have been discharged under the Insolvent Act, because, at the time of making out his schedule, the note was not in existence. In the case of *Simpson v. Pogson and Wife* (a), the creditor of an insolvent, who petitioned to be discharged under the Insolvent Act, obtained from his debtor while in prison a bill of exchange for his debt, and indorsed it to an innocent holder for a valuable consideration. It was there holden, that, although this might be a fraudulent preference of the creditor, the insolvent's discharge was no bar to an action upon the bill by the innocent indorsee. Here, the plaintiff

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(a) 3 D. & R. 567.

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was an innocent holder of the note, and therefore was entitled to proceed upon it.

Kelly, in support of the rule.—By the express words of the Insolvent Debtors' Act, the defendant cannot be kept in custody "for or by reason of any debt" in respect of which he has been discharged. The question here is, not whether he shall be discharged from the debt altogether, but whether he shall be kept in custody for it on *mesne* process. At the time the schedule was filed, the note was not in existence; but the debt for a part of which it was given as security, was, and was stated in the schedule. Under the threat of opposition, the defendant gave four promissory notes for the amount of the debt; and *King*, knowing that they would be void in his hands, paid one of them away, and the present action was brought upon it. Now, supposing it had been a warrant of attorney, there is a clear authority to shew that it would have been void. In the case of *Jackson v. Davison* (a), where a debtor having petitioned the Insolvent Court to be discharged under the act, a creditor gave notice of his intention to oppose him, on the ground that the debt was fraudulently contracted. To induce the latter to withdraw his opposition, the insolvent agreed to execute within three days after his discharge a warrant of attorney for the debt, and in the mean time gave a promissory note of a third person for the amount, which was to be delivered up on the execution of the warrant of attorney. The insolvent was discharged, and the warrant of attorney was executed. The Court set aside the warrant of attorney, and the judgment entered up thereon, on the ground that the agreement on which they were founded was contrary to the policy of the Insolvent Act, inasmuch as it enabled the creditor to take to himself a large portion of the future

(a) 4 B. & Ald. 691.

effects which the Legislature intended to be distributed amongst all the creditors. In that case, three of the Judges commented very strongly on the conduct of one creditor thus effecting a fraud upon the others. Mr. Justice *Bayley* observes: "It is a part of the policy of the Insolvent Debtors' Act, that the property of the debtor should be divided rateably among his creditors. Now, if this warrant of attorney were to stand as a valid security, it might operate in fraud of the general body of creditors, by enabling the present plaintiff to take from them a large portion of the future effects of the debtor, which the Legislature manifestly intended to be distributed among all the creditors. Now, it has been holden, in the case of a composition deed, that, if one of the creditors, before executing the deed, obtain from the insolvent a security for the residue of his demand, by refusing to execute until such security be given, that security is void in law, because it was a fraud upon the rest of the creditors. So too, by the express provisions of the bankrupt laws, any security given to a creditor as a consideration to persuade him to sign a certificate, is void (a). Now, it was manifestly the intention of the Legislature by this act of Parliament to secure a portion of the future effects of the debtors for the benefit of those creditors whose names are inserted in the schedule.' This is a clear authority to shew that the Court would not permit the other creditors to be defrauded by the threat of the creditor to whom the warrant of attorney was given, although the circumstances of that case were not so strong as those of the present. The question is, therefore, whether the Court will not carry into effect the same rule with respect to promissory notes.

Then, as to the delivery up of these notes by *King*. As between *King* and the defendant, it being a fraud on the creditors, the former could not recover them; and the question

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(a) *Cockshott v. Bennet*, 2 T. R. 166; *Jackson v. Duchaire*, 3 T. R. 763; *Jackson v. Lomas*, 4 T. R. 551; *Leicester v. Rose*, 4 East, 372.

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is, whether, this attorney having obtained possession of these notes under such aggravated circumstances, the Court will not interfere, and make him deliver them up. He has treated them as part of the original debt, in fraud of the other creditors; and, part of that debt being for business done as an attorney, I should hope that the Court will interfere to make him deliver up those notes. On an application to make an attorney pay costs under 43 *Geo. 3*, c. 46, the Court said, that in other cases they had no jurisdiction; but that, in the case of an attorney, it had an authority to make him pay them, and therefore it made the rule absolute for that purpose. We might, it is true, have a remedy in equity, but, before we could obtain it, Mr. *King* might pay away all these notes for a valuable consideration.

Then again, as to the first point, whether the Court will discharge this defendant out of custody, on the ground of his having been relieved from the debt under the Insolvent Act. The case in *Dowling & Ryland* I do not dispute. The plaintiff in this case may, perhaps, have a good cause of action on this note against the present defendant; and, if it appears that he took the note without knowledge, he may recover. But, whatever may be the defence at the trial, this being a note given for a debt inserted in the schedule, from which debt the defendant has been discharged under the act, he is now "imprisoned by reason" of that debt, and consequently entitled to have the bail bond delivered up. In the case of *Wilson* and another v. *Kemp* (a), it was holden that there was no distinction between the *bond fide* holder and the original party, as to the discharge of the defendant. The language of the statute 54 *Geo. 3*, c. 28, under which the application was there made, is somewhat different from that of the 7 *Geo. 4*, c. 57. The words of the former statute are "by reason of any debt contracted, incurred, occasioned." I quote this case to shew, first, that

(a) 3 M. & S. 595.

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the Court will put a liberal construction on the statute, in favour of liberty; and secondly, that it is not necessary, that the debt for which he has been arrested should be the same as that from which he was discharged under the Insolvent Act; but merely that it should be a debt by reason of the one from which he was so discharged. The language of Lord *Ellenborough* is this: "The word 'occasioned' is of very large import, including both the consideration and the promise. We think, therefore, in furtherance of the clear object of the act of Parliament, the defendant should not be held to bail on this promise, although it may be the foundation of an action." I submit that there is no difference between the words "by reason of any debt," and "occasioned by any debt." The object of the Legislature was, that a party should not be imprisoned on account of a debt from which he had been discharged.

PATTESON, J.—You are driven to argue that the debt is virtually stated in the schedule. But the bill is not stated in the schedule.

Kelly.—It could not be, because it was not in existence. The ground on which I put the case is this—that, if the party is arrested here, he is arrested "by reason of a debt" from which he was discharged. It is no discharge of this debt, if the plaintiff be a *bonâ fide* holder without knowledge. But, though it is no defence at the trial, yet the Court has always, under such circumstances, discharged a defendant out of custody. I have not produced a case; but it is the constant practice of the Court.

PATTESON, J.—But that is where the bill has been scheduled.

Kelly.—The ground of your Lordship's difficulty appears to be, that this is not a debt from which the defend-

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ant has been discharged by the Insolvent Debtors' Act. That may be. But it is enough for me to shew that he was discharged from the debt which gave rise to this debt. It seems to me exactly the case of a doubtful question, as to whether the holder of a bill of exchange had notice. In the case of *Sammon v. Miller* (a), the marginal note is this:—"In *January*, 1819, *A.* had been discharged under the Insolvent Debtors' Act, 53 *Geo. 3*, c. 102; in the schedule, *B.* was described to be a creditor in respect of 2000*l.*, 5*l. per cent.* Navy Bank Annuities, lent by *B.* to the defendant; and to secure the replacing of the stock on the 9th of *October*, 1820, and the payment of the dividends in the mean time, *B.* held *A.*'s bond, and a warrant of attorney upon which judgment had been entered up; *B.* afterwards held *A.* to bail upon the judgment; holden, that *A.* was entitled to be discharged on filing common bail, under the 29th section of the 53 *Geo. 3*, c. 102, which enacts, 'That no prisoner who shall have obtained his discharge shall be imprisoned by reason of any judgment or decree obtained for payment of money, or for any debt incurred, and with respect to which such discharge shall have been obtained.' There is also the case of *Gordon v. Wood* (b), which took place in *Hilary* Term of last year. There, a person moved that a bail-bond might be delivered up to be cancelled, on the ground of his having been discharged under the Insolvent Debtors' Act from the debt for which he had been arrested. In answer to the application, the plaintiff made an affidavit that he was unacquainted with the fact. The Court said that would be a proper question at the trial: it would be a defence if he had notice; but that, this being a matter which was in fact the question to be tried in the cause, they would make the rule absolute for giving up the bail bond to be cancelled. On the authority of these cases, and the language of

(a) 2 B. & C. 770.

(b) Not reported.

the act of Parliament, I submit that the bail bond in this case ought to be delivered up to be cancelled, on filing common bail.

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PATTESON, J., having stated the facts of the case—It is quite clear that these notes could not have been inserted in the schedule, because at the time of their making the schedule was given in by the defendant. But, the consideration for these notes was inserted in the schedule, namely, the debt consisting of work and labour and money lent. It is quite clear that these notes would be void in the hands of *King*. They would also be void in the hands of those who took them with knowledge. But it is said, that the present plaintiff is an innocent holder. The question, whether the plaintiff has a right to recover, is a question for the Jury. It depends upon the fact whether or not he is an innocent *bond fide* indorsee? But, the act of Parliament says, “that no person who shall have become entitled to the benefit of this act shall at any time hereafter be imprisoned by reason of any debt or sum of money or costs, with respect to which such person shall have become so entitled.” Now, in order to see in respect of what debts the defendant would be entitled to his discharge, we must have recourse to section 46. By that section, he is entitled to his discharge “as to the several debts or sums of money due, or claimed to be due, at the time of filing such prisoner’s petition, from such prisoner to the several persons named in his or her schedule as creditors, or claiming to be creditors, for the same respectively.” It is quite clear, therefore, that this defendant was entitled to the benefit of this act, with respect to the debt in consideration of which the present notes were given. He must, therefore, be said to have been arrested by reason of a debt in respect of which he was entitled to his discharge under the Insolvent Act. On the authority, therefore, of

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the case stated by Mr. *Kelly*, and as the debt in respect of which the note was given was one upon which the defendant was entitled to his discharge under the Insolvent Act, I think that this is such a case as calls on me to direct the bail bond to be delivered up to be cancelled, on filing common bail. That does not prevent the plaintiff from recovering, if he goes before a Jury.

With respect to the other part of the application, which requires that *King* shall deliver up the promissory notes still in his possession, it is said, that Mr. *King* may indorse them over to *bond fide* holders, and thus render the defendant liable upon them, and that this might be done pending an application to a Court of equity; and it is also said, that *King* is an attorney of the Court, and that, therefore, we can interfere, though, if he were not, we should have no jurisdiction so to do. This is not, however, like the case of a warrant of attorney. But the mere question here is, whether the circumstance of *King* being an attorney, authorizes us to interfere? If this had been done in his capacity of attorney, we could have interfered; but it was not done in his capacity of attorney, but as a creditor. I feel, therefore, that I am bound to discharge the latter part of the rule, as to giving up the notes. As they were taken at a time when *Masters* was in custody, on the ground of his discharge not being opposed, that part of the rule requiring the bail bond to be delivered up to be cancelled must be made absolute, though without costs, as it does not appear that the plaintiff had any knowledge of the circumstances under which the note which he holds was obtained.

Rule absolute, without costs, for the delivering up of the bail bond to be cancelled; and discharged for delivering up the notes by *King*.

1831.

BROWN v. WRIGHT.

June 11th.

BARSTOW shewed cause why all proceedings should not be stayed until the plaintiff had given security for costs. The application was made on two grounds—*first*, that the plaintiff was residing abroad, in *America*; and *secondly*, that the attorney bringing the action had no proper authority for that purpose from the plaintiff. It was an action of trespass for entering the plaintiff's house and injuring his goods. The defendant had pleaded. With respect to the first ground, the defendant's attorney did not deny that he knew the plaintiff was abroad at the time he pleaded; and it was sworn by the plaintiff's attorney, that he must have been acquainted with the fact, for he had come to the office, and obtained the information that the plaintiff was in *America*. It must therefore be taken, that the defendant knew the fact. Now, in *Duncan v. Stint* (a), in which a similar application had been made, the Court said, "that, when a cause is pending, a party, if he means to apply for security for costs, must take no step after he knows the plaintiff is out of *England*; for a defendant ought not to wait until expense has been necessarily incurred, which must frequently be the case, particularly in actions of trespass and replevin." The first ground, therefore, failed entirely. Then, as to the second, namely, that the attorney bringing the action had not sufficient authority for that purpose, the attorney had received instructions from the plaintiff's wife. The plaintiff being absent from this country, his wife was not to be left defenceless, but the authority of the wife was sufficient against the consent of the husband. In the case of *Chambers v. Donaldson* (b), a *feme covert* living apart from her husband, under sentence of separation, with ali-

Where a defendant pleads after it has come to his knowledge that the plaintiff is abroad, the Court will not oblige the latter to give security for costs.

(a) 5 B. & Ald. 702.

(b) 9 East, 471.

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mony allowed, *pendente lite*, in the Ecclesiastical Court, having brought trespass in the name of her husband against a wrongdoer, for breaking and entering her house and taking her goods, the Court refused, on the application of the defendant, to stay the action, though supported by an affidavit of the husband (who had not released the action, nor applied to be indemnified against the risk of costs), that the action was brought without his authority. Now here, there was no pretence for saying that the action was brought against the consent of the husband, or that he would repudiate the authority of the attorney. But, the warrant of attorney, Mr. Tidd (a) laid it down, might be filed at any time before final judgment. So that, at present, there did not appear any reason for the application on the latter ground. On both points he submitted that the rule must be discharged.

Cresswell, in support of the rule, contended that this was the common case of a defendant applying for security for costs, where the plaintiff was out of the country; and the facts of the case of *Duncan v. Stint* were different.

PATTESON, J.—On the authority of *Duncan v. Stint*, where the Court laid it down “that, when a cause is pending, a party, if he means to apply for security for costs, must take no step after he knows that the plaintiff is out of *England*; for, a defendant ought not to wait until expense has been necessarily incurred, which must frequently be the case, particularly in actions of trespass and replevin.” I think you are too late in your application. The rule must therefore be discharged.

Rule discharged (b).

(a) 1 Tidd's Pr. 95, 9th. ed.

(b) See 1 Reg. Gen. H. T. 2 W. 4, r. 98, *post*.

1831.

June 13th.

— Executors, v. —

ADDISON shewed cause against a rule obtained by **White**, for setting aside proceedings for irregularity, on the ground that the declaration did not correspond with the affidavit and writ, the latter describing the plaintiffs as "executors of" &c., and the declaration being general, in their own right. He contended, that, though the process and affidavit stated that the plaintiffs were executors, yet, as they did not state that the plaintiffs sued "*as executors*" the declaration was correct, it being general and not stating the cause of action to have accrued to them "*as executors*." This was no variance; and he cited the case of *Henshall v. Roberts* (a) where error was brought for misjoinder of counts, the first count shewing a cause of action which accrued to the testator in his lifetime, and the last stating a promise to the plaintiff "executor," not "*as executor*," and it was held, that there was a misjoinder, for executor without the word "*as*" was merely description, and would not prevent the plaintiff proving a cause of action which accrued to him in his own right (b); and therefore he contended, that, in this case, the words "executors of" &c., in the affidavit and writ, were only description, and did not necessarily import that the cause of action accrued to them in their representative character.

Where the affidavit of debt and writ stated the debt to be due to the plaintiffs "executors of," and not "*as executors of*," and the declaration stated it to be due to them in their own right: — *Holden*, no variance.

White, in support of the rule, submitted that it was never usual to state in the writ, that the plaintiffs sued "*as executors*," and it had been always thought sufficient to state them to be "executors of," to shew that they were suing in their representative character (c): and he cited

(a) 5 East, 150.

(b) See 1 Tidd, Prac. 328, 9th ed.; 1 Archb. K. B. Prac. 34.

(c) But, from the forms in the books, the *ac etiam* appears to be

to answer the plaintiff "*as executor*" &c. See Impey, C. P. 91. 7th ed. Tidd's Forms, c. 8, s. 36, 9th ed.

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Tidd, 450, 9th ed. where the rule is laid down in general terms, that, though, where the process is general, the declaration may be particular, as well in bailable as in serviceable process, yet that, where the process is particular, as by executors or assignees, as such, the declaration must correspond with it, or it will be a variance.

PATTESON, J.—I am not aware, that the rule has been ever carried to the extent Mr. *Addison* contends for, but I see no reason why it should not. The proceedings are therefore regular, and the rule must be discharged, but without costs, as the point is new.

Rule discharged, without costs (a).

(a) There are numerous cases in the books upon the effect of a variance between the process and declaration in the description of the parties suing. The result of them appears to be—1st, That all process is considered general, unless it is stated in the writ that the plaintiff sues “as executor,” &c., and does not merely describe himself “executor.” The above reported case is an authority upon this point; and from the notes to *Rogers v. Jenkins*, 1 Bos. & Pull. 383, it appears to have been always so considered. In *Lloyd, qui tam, v. Williams*, 2 Sir W. Bl. 722, it is said that *Yates, J.*, in *Canning v. Davis*, 4 Burr. 2417, made this distinction, “that, though a plaintiff style himself executor, or give himself any other superfluous description in the process, it will not hurt.” The title of executor or administrator was considered in 9 Hen. 5, c. 3, as a superfluous addition by those who thought the

writ was good, for they compared it to the addition of Carpenter, &c.

2nd, That, upon general process, the plaintiff may declare in a particular character, as *qui tam*, or *in auter droit*, &c. (*Harvey v. Sparing*, Imp. C. B. 233, 1 Bos. & Pul. 383; *Weavers' Company v. Forrest*, 2 Str. 1232; *Ashworth v. Ryall*, 1 Barn. & Ald. 19). And this last case overruled a dictum in *Turing v. Jones*, 5 T. R. 402, and other cases to the contrary. Therefore, in the *King's Bench*, the variance is no ground either for setting aside proceedings, or discharging bail; but, though in the *Common Pleas*, the proceedings will not be set aside (3 Wils. 61, 2 Sir W. Bl. 722), yet the bail are discharged. *Lloyd v. Williams*, 3 Wils. 61.

3rd, If the writ is special, to answer the plaintiff “as executor,” &c., the declaration must correspond with it. Both in K. B. and C. P. it will be a ground, not only for

discharging bail, but for setting aside proceedings. (*Douglas and others v. Irlam*, 8 T. R. 416, 2 Strange, 1232, 4 Burr. 2417; *Rogers v. Jenkins*, 1 Bos. & Pull. 383; *Murrell v. Sowett*, MS. Archb. K. B. 68, 2nd ed.)

The same rules hold with re-

spect to defendants; and it has been decided that a defendant may be declared against "as administrator," though the process describes him generally. *Watson v. Pilling*, 3 Brod. & B. 446; 6 Moore, 66, S. C.

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ADAMS *v.* DRUMMOND.

June 13th.

(*Before the four Judges*).

HUTCHINSON shewed cause against a rule obtained by *S. Hughes*, on a previous day, to set aside an interlocutory judgment for irregularity, in being signed too soon. Before the time for pleading had expired, a summons for time to plead, and another summons for particulars of plaintiff's demand, were taken out by the plaintiff's attorney. At the end of the printed form of the summons for time, the Judge's clerk added the words "after delivery of particulars." These words were scratched out; and it was sworn by the plaintiff's attorney, in answer to the rule, that he erased them because he would not consent to an order for a week's time after delivery of particulars. But, on the back of the summons there were the words—"Take a week, on the usual terms;" and on the back of the summons for particulars—"Take an order." The orders were accordingly drawn up in the usual form. The order for time was dated *May* 24th; the order for particulars, *May* 25th; particulars delivered, *May* 28th; judgment signed, *June* 1st. The order had been drawn up contrary to the terms of the plaintiff's consent. The words "after the delivery of particulars" expressly appeared to have been struck out of the form of the summons; and when orders for time and particulars were given together, the order for particulars had no effect on the order for time.

Where an order for particulars and an order for time to plead have been obtained, the time for pleading will run, although no particulars are given, unless it is expressed in the order for time to plead, that it is not to begin to run till after the delivery of particulars.

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S. Hughes, in support of the rule.—The orders were drawn up in the usual form; and, in the order for particulars, it was expressly stated, that, in the mean time, all proceedings should be stayed. He referred to 1 *Tidd's Prac.* p. 598, 9th ed., where it is laid down, that, "after a delivery of a bill of particulars, the defendant in the *King's Bench* has the same time to plead as he had when the summons for it was returnable;" and no distinction is taken where the summons and order for time to plead state that it is to be after delivery of particulars, or without these words, as is most frequently the case. If the order for particulars were drawn up improperly, and contrary to the consent given by the plaintiff's attorney, he ought, when he was served with the order, to have returned it, or got it discharged.

LORD TENTERDEN, C. J.—The order for time ought to have stated, on the face of it, that it was to be "after delivery of particulars." I have frequently put in these words with my own hand.

PARKE, J.—I have great doubt on this point.

Rule discharged (a).

(a) The practice of requiring particulars of demand is of modern origin. *Per Bayley, J., Somers v. King*, 6 D. & R. 125. Indeed, no trace of it can be found in Crompton & Richardson, and the earlier books of practice.

The above case must be considered as laying down a new rule on this subject, or at least modifying and explaining the rule which is laid down in the books of practice; and therefore, where an order for time is obtained, and, more

especially, where summonses for time and for particulars are taken out together, care should be used to express, in the order for time, that the time obtained, whether by consent or otherwise, is to be "after delivery of particulars," or else the time for pleading will be considered as running on, and will expire at the end of the time granted, if the particulars have been delivered within that time; for, it is conceived that the rule must be taken with that qualification, and

that the plaintiff would not be at liberty to sign judgment until he has complied with the order, by delivering particulars. This was laid down in *Hifferman v. Langelle*, 2 B. & P. 365; and it was there decided, that, though a plaintiff cannot sign judgment until an order for a particular has been complied with, yet he may do so after having delivered the particular, provided the time for pleading be then elapsed. Judgment cannot, however, be signed till twenty-four hours have expired after the delivery of the particular, though the time for pleading is out, and a demand of plea made twenty-four hours before judgment signed. *Ramsay v. Lord Reay*, 2 N. R. 361. The same rule was adhered to in *Decker v. Thompson*, 3 B. & P. 319; where it was held, that, if defendant get an order for security for costs, though the plaintiff gives it immediately, still, he must wait till the opening of the office on the next day, before he can sign judgment. The effect of an order for particulars is different in the *King's Bench* from what it is in the *Common Pleas*. In the latter Court it was held, in *Hifferman v. Langelle*, 2 B. & P. 363, that an order for a bill of particulars does not suspend the time for pleading; and therefore, where a declaration was delivered *de bene esse*, indorsed to plead in — days, the Court said that the indorsement amounted to a notice to plead according to the rules of Court, viz. in four days; and, as the declaration was delivered on the 17th, and the order for parti-

culars, which was obtained on the 19th, was complied with on the 20th, a judgment signed on the 21st, for want of a plea, was holden to be regular. In *Mowbray v. Schuberth*, 13 East, 508, it was expressly decided by the Court of *King's Bench*, on reference to the Master, that the defendant has the same time to plead after the delivery of particulars, as he had when the summons for it was returnable. It should seem, however, that this case was rather broken in upon by *Hughes v. Walden*, 5 B. & C. 771, where *Abbott, C. J.*, says—"When a defendant obtains a rule which stays the plaintiff's proceedings, he is not entitled (as contended for) to the same time for the purpose of taking the next step, as he had when he obtained a rule. But I think that a defendant in such a case should have a reasonable time allowed him, for the purpose of taking his next proceeding." In *Glover v. Watmore*, 5 B. & C. 769, where a summons for better particulars was obtained by the defendant four days before the time for pleading had expired, but the plaintiff's attorney did not attend till the third summons, when the order was refused, and immediately afterwards signed judgment (the time for pleading being expired), the Court set aside the judgment, as having been signed too soon; for, that the principal delay was created by the plaintiff, 1st, in not delivering any particular until the 2nd of May, although the order for it was obtained on the 21st of April; and, 2ndly,

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in not attending the first or second summons for better particulars. From all these cases, it should seem that the Court exercises a discretion according to the circumstances of the case. In the case of *Adams v. Drummond*, above reported, there certainly was ample time for the defendant to have pleaded between the 28th May, when the particulars were delivered, and the 1st of June, when judgment was signed; and this, coupled with the absence of the words "after delivery of particulars," in the order, they appearing expressly to have been erased from the summons, induced the Court not to set aside the judgment; for,

it is conceived, that the fact which the plaintiff's attorney stated in his affidavit, that he only consented to give a week's time from the 28th, without reference to the order for particulars, could not properly be taken notice of by the Court. In *Joddrel v. —*, 4 Taunt. 253, the Court held that they must look to the order, and that it should be always properly drawn up and served; and the Court would take no notice of a summons with a consent indorsed on it, to give relief to the plaintiff, though the defendant had proceeded in direct breach of good faith. See 1 Reg. Gen. H. T. 2 W. 4, r. 47, *post*.

REGULÆ GENERALES (a).

PRACTICE.

Bail may be put in and justify at the same time, after four days' notice.

Time to inquire, how obtained.

IT IS ORDERED, That a defendant may justify bail at the same time at which they are put in, upon giving four days' notice for that purpose, before eleven o'clock in the morning, and exclusive of *Sunday*. That, if the plaintiff is desirous of time to inquire after the bail, and shall give one day's notice thereof as aforesaid to the defendant, his attorney, or agent, as the case may be, before the time appointed for justification, stating therein what further time is required, such time not to exceed three days in the case of town bail, and six days in the case of country bail, then

(a) For the alterations effected by these rules in the Practice of the *King's Bench*, *Common Pleas*,

and *Exchequer*, *Vide Jervis's Rules & Orders*, pp. 30—50; and *Chitty's Practice*, p. 333.

(unless the Court or a Judge shall otherwise order) the time for putting in and justifying bail shall be postponed accordingly, and all proceedings shall be stayed in the mean time.

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2. And it is further ordered, That every notice of bail shall, in addition to the descriptions of the bail, mention the street or place, and number (if any), where each of the bail resides, and all the streets or places, and numbers (if any), in which each of them has been resident at any time within the last six months, and whether he is a house-keeper or freeholder.

Form of the notice of bail.

3. And it is further ordered, That, if the notice of bail shall be accompanied by an affidavit of each of the bail, according to the form hereto subjoined (a), and if the plaintiff afterwards except to such bail, he shall, if such bail are allowed, pay the costs of justification; and, if such bail are rejected, the defendant shall pay the costs of opposition, unless the Court or a Judge thereof shall otherwise order.

If an affidavit of justification accompany the notice, the costs of the opposition are to be paid by plaintiff, if bail justify; and by defendant, if bail are rejected.

4. And it is further ordered, That, if the plaintiff shall not give one day's notice of exception to the bail by whom such affidavit shall have been made, the recognizance of such bail may be taken out of Court without other justification than such affidavit.

If one day's notice of exception not given, bail complete.

5. And it is further ordered, That the bail of whom notice shall be given, shall not be changed without leave of the Court or a Judge.

Bail not to be changed without leave.

6. And it is further ordered, That, with every declaration, if delivered, or with the notice of declaration, if filed, containing counts in *indebitatus assumpsit*, or debt on simple contract, the plaintiff shall deliver full particulars of his demand under those counts, where such particulars can be comprised within three folios; and, where the same cannot be comprised within three folios, he shall deliver such a statement of the nature of his claim,

Particulars of demand, with *indebitatus* counts, to be delivered with declaration.

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Which, together with notice of set-off, to be annexed to the record.

No imparlance where the declaration is delivered on or before the last day of term.

There must be four days' demand of declaration before *non pros*.

Only two summonses before an order.

No declaration *de bene esse*, till six days after the arrest or service of process.

Ejectments may

and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios. And, to secure the delivery of particulars in all such cases, it is further ordered; That, if any declaration or notice shall be delivered without such particulars, or such statement as aforesaid, and a Judge shall afterwards order a delivery of particulars, the plaintiff shall not be allowed any costs in respect of any summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver. And that a copy of the particulars of the demand, and also particulars (if any) of the defendant's set off, shall be annexed by the plaintiff's attorney to every record, at the time it is entered with the Judge's Marshal.

7. And it is further ordered, That, upon every declaration delivered or filed on or before the last day of any term, the defendant, whether in or out of any prison, shall be compellable to plead as of such term, without being entitled to any imparlance.

8. And it is further ordered, That no judgment of *non-pros* shall be signed for want of a declaration, replication, or other subsequent pleading, until four days next after a demand thereof shall have been made in writing, upon the plaintiff, his attorney, or agent, as the case may be.

9. And it is further ordered, That, hereafter, it shall not be necessary to issue more than two summonses for attendance before a Judge upon the same matter; and the party taking out such summonses shall be entitled to an order on the return of the second summons, unless cause is shewn to the contrary.

10. And it is further ordered, That no declaration *de bene esse* shall be delivered until the expiration of six days from the service of the process, in the case of process which is not bailable, or until the expiration of six days from the time of the arrest, in case of bailable process; and such six days shall be reckoned inclusive of the day of such service or arrest.

11. And it is further ordered, That declarations in eject-

ment may be served before the first day of any term, and thereupon the plaintiff shall be entitled to judgment against the casual ejector, in like manner as upon declarations served before the essoign, or first general return-day.

be served before the first day of full Term.

12. And it is further ordered, That, before taxation of costs, one day's notice shall be given to the opposite party.

Notice to tax costs.

13. And it is further ordered, That no rule to shew cause, or motion, shall be required, in order to obtain a rule to plead several matters, or to make several avowries or cognizances; but that such rules shall be drawn up upon a Judge's order, to be made upon a summons, accompanied by a short abstract or statement of the intended pleas, avowries, or cognizances. Provided, that no summons or order shall be necessary in the following cases, that is to say, where the plea of *non assumpsit*, or *nil debet*, or *non detinet*, with or without a plea of tender as to part, a plea of the statute of limitations, set-off, bankruptcy of the defendant, discharge under an insolvent act, *plene administravit*, *plene administravit præter*, infancy, and coverture, or any two or more of such pleas, shall be pleaded together; but, in all such cases, a rule shall be drawn up by the proper officer, upon the production of the engrossment of the pleas, or a draft or copy thereof.

Rule to plead double to be obtained on summons.

In certain cases, no rules necessary.

14. And it is further ordered, that these rules shall take effect on the first day of next *Michaelmas* Term, except the rule as to the service of declarations in ejectment, which shall take effect from the 25th day of *October* next.

Commencement of these rules.

TENTERDEN,
N. C. TINDAL,
LYNDHURST,
J. BAYLEY,
J. A. PARK,
J. LITLEDAL,
S. GABELE,

J. VAUGHAN,
J. PARKE,
W. BOLLAND,
J. B. BOSANQUET,
W. E. TAUNTON,
E. H. ALDERSON,
J. PATTESON.

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FORM OF AFFIDAVIT [OF BAIL].

In the ().

Between &c.

Form of the affidavit of justification referred to ante, p. 103.

A. B., one of the bail for the above-named defendant, maketh oath and saith, that he is a housekeeper [or freeholder, *as the case may be*], residing at [*describing particularly the street or place, and number, if any*]; that he is ~~possessed of~~ ^{owns} property to the amount of £ , [*the amount required by the practice of the Courts*] over and above all his just debts; [*if bail in any other action, add* "and every other sum for which he is now bail;"] that he is not bail for any defendant except in this action, [*or if bail in any other action or actions, add, "except for C. D., at the suit of E. F., in the Court of , in the sum of £ ; for G. H., at the suit of I. K., in the Court of , in the sum of £ ;" specifying the several actions, with the Courts in which they are brought, and the sums in which the deponent is bail*]; that the deponent's property, to the amount of the said sum of £ , ["and," *if bail in any other action or actions, "of all other sums for which he is now bail as aforesaid,"*] consists of [*here specify the nature and value of the property in respect of which the bail proposes to justify, as follows:—"* stock in trade, in his business of , carried on by him at , of the value of £ ; of good book debts owing to him to the amount of £ ; of furniture in his house at , of the value of £ ; of a freehold or leasehold farm, of the value of £ , situate at , occupied by , or of a dwelling-house of the value of £ , situate at , occupied by , "*or of other property, particularising each description of property, with the value thereof*]; and that the deponent hath, for the last six months, resided at , [*describing the place or places of such residence*].

Sworn, &c.

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PLEADING.

WHEREAS declarations in actions upon bills of exchange, promissory notes, and the counts usually called the common counts, occasion unnecessary expense to parties, by reason of their length, and the same may be drawn in a more concise form: Now, for the prevention of such expense, It is ORDERED, That, if any declaration in *assumpsit* hereafter filed or delivered, and to which the plaintiff shall not be entitled to a plea as of this term, being for any of the demands mentioned in the schedule of forms and directions annexed to this order, or demands of a like nature, shall exceed in length such of the said forms set forth or directed in the said schedule as may be applicable to the case; or, if any declaration in debt to be so filed or delivered for similar causes of action, and for which the action of *assumpsit* would lie, shall exceed such length, no costs of the excess shall be allowed to the plaintiff if he succeeds in the cause; and such costs of the excess as have been incurred by the defendant shall be taxed and allowed to the defendant, and be deducted from the costs allowed to the plaintiff. AND IT IS FURTHER ORDERED, That, on the taxation of costs as between attorney and client, no costs shall be allowed to the attorney in respect of any such excess of length; and, in case any costs shall be payable by the plaintiff to the defendant, on account of such excess, the amount thereof shall be deducted from the amount of the attorney's bill.

TENTERDEN,
N. C. TINDAL,
LYNDHURST,
J. BAYLEY,
J. A. PARK,
J. LITLEDALE,
S. GASELEE,

J. VAUGHAN,
J. PARKE,
W. BOLLAND,
J. B. BOSANQUET,
W. E. TAUNTON,
E. H. ALDERSON,
J. PATTESON.

1831.

SCHEDULE OF FORMS AND DIRECTIONS.

Count on a promissory note against the maker, by payee or indorsee, as the case may be.

FOR THAT WHEREAS the defendant, on the day of , in the year of our Lord , at *London*, [or, in *the county of*], made his promissory note in writing, and delivered the same to the plaintiff, and thereby promised to pay to the plaintiff £ , days [*weeks or months*] after the date thereof, [*or as the fact may be*], which period has now elapsed, [*or, if the note be payable to A. B.*], and then and there delivered the same to *A. B.*, and thereby promised to pay to the said *A. B.*, or order, £ , days [*weeks or months*] after the date thereof, [*or as the fact may be*], which period has now elapsed; and the said *A. B.* then and there indorsed the same to the plaintiff, whereof the defendant then and there had notice, and then and there, in consideration of the premises, promised to pay the amount of the said note to the plaintiff, according to the tenor and effect thereof.

Count on a promissory note against payee by indorsee.

WHEREAS one *C. D.*, on the day of , in the year of our Lord , at *London*, [or, in *the county of*], made his promissory note in writing, and thereby promised to pay the defendant, or order, £ , days [*weeks or months*], after the date thereof [*or as the fact may be*], which period has now elapsed; and the defendant then and there indorsed the same to the plaintiff, [*or, and the defendant then and there indorsed the same to X. Y., and the said X. Y. then and there indorsed the same to the plaintiff*]; and the said *C. D.* did not pay the amount thereof, although the same was there presented to him on the day when it became due: of all which the defendant then and there had due notice.

Count on a promissory note against indorser by indorsee.

WHEREAS one *C. D.*, on , at *London*, [or, in *the county of*], made his promissory note in writing, and thereby promised to pay *X. Y.*, or order, £ , days

[*weeks or months*], after the date thereof, [*or as the fact may be*], which period has now elapsed, and then and there delivered the said note to the said X. Y., and the said X. Y. then and there indorsed the same to the defendant, and the defendant then and there indorsed the same to the plaintiff, [*or, and the defendant then and there indorsed the same to Q. R., and the said Q. R. then and there indorsed the same to the plaintiff*], and the said C. D. did not pay the amount thereof, although the same was there presented to him on the day when it became due; of all which the defendant then and there had due notice.

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WHEREAS the plaintiff, on _____, at *London*, [*or, in the county of* _____], made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the plaintiff £ _____, _____ days [*weeks or months*] after the date [*or sight*] thereof, which period has now elapsed, and the defendant then and there accepted the said bill, and promised the plaintiff to pay the same according to the tenor and effect thereof, and of his said acceptance thereof, but did not pay the same when due.

Count on an inland bill of exchange against the acceptor by the drawer, being also payee.

WHEREAS the plaintiff, on _____, at *London*, [*or, in the county of* _____], made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to *O. P.*, or order, £ _____, _____ days [*weeks or months*] after the date [*or sight*] thereof, which period has now elapsed, and then and there delivered the same to the said *O. P.*; and the said defendant then and there accepted the same, and promised the plaintiff to pay the same according to the tenor and effect thereof, and of his acceptance thereof; yet he did not pay the amount thereof, although the said bill was there presented to him on the day when it became due; and thereupon the same was then and there returned to the plaintiff: of all of which the defendant then and there had notice.

Count on an inland bill of exchange against the acceptor by the drawer, not being the payee.

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Count on an inland bill of exchange against the acceptor, by indorsee.

WHEREAS one *E. F.*, on , at *London*, [or, in the county of], made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the said *E. F.* [or, to *H. G.*] or order, £ , days [weeks or months] after sight [or date] thereof, which period is now elapsed, and the defendant then and there accepted the said bill, and the said *E. F.* [or, the said *H. G.*] then and there indorsed the same to the plaintiff, [or, and the said *E. F.* or the said *H. G.* then and there indorsed the same to *K. J.*, and the said *K. J.* then and there indorsed the same to the plaintiff]: of all which the defendant then and there had due notice, and then and there promised the plaintiff to pay the amount thereof, according to the tenor and effect thereof, and of his acceptance thereof.

Count on an inland bill of exchange against the acceptor by the payee.

WHEREAS one *E. F.*, on , at *London*, [or, in the county of], made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the plaintiff £ , days [weeks or months] after the sight [or date] thereof, which period has now elapsed; and the defendant then and there accepted the same, and promised the plaintiff to pay the same according to the tenor and effect thereof, and of his acceptance thereof.

Count on an inland bill of exchange against the drawer, by payee, on non-acceptance.

WHEREAS the defendant, on , at *London*, [or, in the county of], made his bill of exchange in writing, and directed the same to *J. K.*, and thereby required the said *J. K.* to pay to the plaintiff £ , days [weeks or months] after the sight [or date] thereof, and then and there delivered the same to the said plaintiff; and the same was then and there presented to the said *J. K.* for acceptance, and the said *J. K.* then and there refused to accept the same; of all which the defendant then and there had due notice.

WHEREAS the defendant, on _____, at *London*, [or, in *the county of* _____], made his bill of exchange in writing, and directed the same to *J. K.*, and thereby required the said *J. K.* to pay to the order of the said defendant £ _____, Count on an inland bill of exchange, against drawer by indorsee, on non-acceptance.

_____ days [*weeks or months*] after the sight [or *date*] thereof, and the said defendant then and there indorsed the same to the plaintiff [or, *and the said defendant then and there indorsed the same to L. M., and the said L. M. then and there indorsed the same to the plaintiff*], and the same was then and there presented to the said *J. K.* for acceptance, and the said *J. K.* then and there refused to accept the same; of all which the defendant then and there had due notice.

AND WHEREAS one *N. O.*, on _____, at *London*, [or, in *the county of* _____], made his bill of exchange in writing, and directed the same to *P. Q.*, and thereby required the said *P. Q.* to pay to his order £ _____, _____ days [*weeks or months*] after the date [or *sight*] thereof, and the said *N. O.* then and there indorsed the said bill to the defendant [or, *to R. S., and the said R. S. then and there indorsed the same to the defendant*], and the defendant then and there indorsed the same to the plaintiff, and the same was then and there presented to the said *P. Q.* for acceptance, and the said *P. Q.* then and there refused to accept the same; of all which the defendant then and there had due notice. Count on an inland bill of exchange, against indorser by indorsee, on non-acceptance.

WHEREAS one *N. O.*, on _____, at *London*, [or, in *the county of* _____], made his bill of exchange in writing, and directed the same to *P. Q.*, and thereby required the said *P. Q.* to pay to the defendant, or order, £ _____, _____ days [*weeks or months*] after the sight [or *date*] thereof, and then and there delivered the same to the defendant, and the defendant then and there indorsed the said bill to the plaintiff [or, *to R. S., and the said R. S. then and there indorsed the same to the plaintiff*], and the same was then and there presented to the said *P. Q.* for acceptance, Count on an inland bill of exchange, against payee by indorsee, on non-acceptance.

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and the said *P. Q.* then and there refused to accept the same; of all which the defendant then and there had due notice.

Directions for declarations on bills, where action brought after time of payment expired.

1st. *On Bills payable after Date.*—If the declaration be against any party to the bill except the drawee or acceptor, and the bill be payable at any time after date, and the action not brought till the time is expired, it will be necessary to insert, as in declarations on promissory notes, immediately after the words denoting the time appointed for payment, the following words, *viz. which period has now elapsed*; and, instead of averring that the bill was presented to the drawee for *acceptance*, and that he refused to *accept* the same, to allege that the drawee [naming him] *did not pay the said bill, although the same was there presented to him on the day when it became due.*

2nd. *On Bills payable after Sight.*—And if the declaration be against any party except the drawee or acceptor, and the bill be payable at any time after sight, it will be necessary to insert, after the words denoting the time appointed for payment, the following words, *viz. and the said drawee* [naming him] *then and there saw and accepted the same, and the said period has now elapsed*; and, instead of alleging that the bill was presented for acceptance and refused, to allege that the drawee [naming him] *did not pay the said bill, although the same was presented to him on the day when it became due.*

Directions for declarations on bills or notes payable at sight.

If a *note* or *bill* be payable at *sight*, the form of the declaration must be varied so as to suit the case, which may be easily done.

On foreign bills.

Declarations on foreign bills may be drawn according to the principle of these forms, with the necessary variations.

COMMON COUNTS.

Goods.

WHEREAS the defendant, on _____, at *London*, [or, in the county of _____], was indebted to the plaintiff in

£ , for the price and value of goods then and there bargained and sold, [or *sold and delivered*] by the plaintiff to the defendant, at his request:

1831.

And in £ , for the price and value of work then and there done, and materials for the same provided by the plaintiff for the defendant, at his request:

And in £ , for money then and there lent by the plaintiff to the defendant, at his request:

And in £ , for money then and there paid by the plaintiff for the use of the defendant, at his request:

And in £ , for money then and there received by the defendant, for the use of the plaintiff:

And in £ , for money found to be due from the defendant to the plaintiff, on an account then and there stated between them.

And whereas the defendant afterwards, on &c., in consideration of the premises respectively, then and there promised to pay the said several monies respectively to the plaintiff, on request; Yet he hath disregarded his promises, and hath not paid any of the said monies, or any part thereof, To the plaintiff's damage of £ , and thereupon he brings suit, &c.

If the declaration contains one or more counts against the maker of a note, or acceptor of a bill of exchange, it will be proper to place them first in the declaration; and then in the general conclusion to say—promised to pay the said *last-mentioned several monies respectively*.

END OF TRINITY TERM,

Michaelmas Term,

IN THE SECOND YEAR OF THE REIGN OF WILLIAM IV.

1831.

Nov. 3rd.

GRAY v. HARVEY.

Where a defendant has been arrested for goods sold and delivered, and money lent and advanced, though the declaration contains no count for goods sold and delivered, the Court will not enter an *exoneretur* on the bail piece.

TURNER moved for a rule to shew cause why an *exoneretur* should not be entered on the bail-piece, on the ground that the defendant had been arrested for a debt alleged to be due for goods sold and delivered, and money lent and advanced; but the declaration contained no count for goods sold and delivered. On the plaintiff's own shewing, consequently, he arrested the defendant for a demand which had no existence. The Court, therefore, ought to interfere to relieve the bail, who were thus deceived by the plaintiff's misstatement, and had, consequently, become bound for a debt acknowledged by him not to be owing.

LITLEDALE, J.—I cannot relieve you in this case. The plaintiff might recover on the count for money lent and advanced, as far as he could prove. If he should be unable to prove the whole of his demand, the liability of the bail is to a less amount.

Rule refused.

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ANONYMOUS.

Nov. 8th.

CHANNELL opposed country bail, on the ground that the affidavit of sufficiency, which purported to be according to the new rules of last *Trinity* Term, was joint, whereas the form prescribed by them was several (a).

LITLEDALE, J.—I think that will do. Although the affidavit is joint, it is the affidavit of each. It was joint in the case of country bail, under the former rules.

Channell then objected, that, although the affidavit purported to be made according to the form prescribed by the new rules, after alleging that the bail had sufficient property to pay the sum for which they became bound, "over and above all their just debts," stated, that one of them had become bail for a particular person, but did not state the amount of the debt. By the new form, he ought to state the amount of the sum for which he had become bail.

LITLEDALE, J.—He is not bound to adopt the new form. If he swears sufficient, according to the old rule, that is enough. But, as he has chosen to go on, and state the circumstance of his having become bail in another action, time had better be taken, till the particulars of that statement shall be given by him.

Though the form of the affidavit to be made by bail, according to the new rules of *Trinity* Term, 1 *Will.* 4, is several, it may be made jointly.

An affidavit of sufficiency by country bail, purporting to be according to the rules of *Trinity* Term, 1 *Will.* 4, and not containing all its requisites, is good, if it be sufficient according to the old rules.

(a) See *ante*, p. 106.

1831.

REX v. The Justices of MIDDLESEX.

Nov. 10th.

(Before the four Judges.)

Where two acts of Parliament come into operation on the same day, and are repugnant, the one which last received the royal assent virtually repeals the other.

A RULE *nisi* for a *mandamus* to the Justices of *Middlesex*, commanding them to appoint a surveyor or surveyors of the highways, in the parish of *Clerkenwell*, under the provisions of the General Highway Act (a), had been obtained by *Bodkin*. This application was made to obtain the opinion of the Court as to the construction of two acts of Parliament passed in the 10th year of his late Majesty, *George* the Fourth, relating to the repair of certain roads in the parish of *Clerkenwell*. By several local acts of Parliament, the highways of that parish were placed under the management of a local board of commissioners. The 10 *Geo.* 4, c. 59, which was a local act introduced to amend those acts, directed that the roads in question, (which until then had been turnpike roads), should, from the commencement of that act, be repaired by the local board of commissioners. This act received the royal assent on the 1st of *June*, 1829, and was directed to commence on the 1st of *January*, 1830. In the same session of Parliament, an act to regulate the management of certain turnpike roads near *London*, (10 *Geo.* 4, c. 1), also passed, by which it was directed, that, from and after the 1st day of *January*, 1830, the roads in question, amongst others, should be repaired and managed by a surveyor or surveyors, to be appointed under the provisions of the General Highway Act. The latter received the royal assent on the 19th of *June*, 1829.

French shewed cause.—No act can be altered during the same session in which it passes, unless it contain a

(a) 13 *Geo.* 3, c. 78.

clause authorizing such alteration. The 10 *Geo.* 4, c. 59, is the earlier chapter of the two. That act must therefore be taken as now in operation. The local board are most competent to the task.

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Bodkin, contra.—The rule as to the alteration of the statute during the same session in which it may pass, is merely a parliamentary regulation. The two provisions being manifestly repugnant, that which last received the royal assent must be considered as virtually repealing the other. In the case of *The King v. The Chelsea Water Works Company (a)*, it was decided, that, where two provisions in the same statute are repugnant, the last shall control the former, on the presumption that it was last under the consideration of the Legislature. Here, the statute directing the appointment of a surveyor received the royal assent, and thereby became law, several days after that which gave the management of the roads in question to the local commissioners; and the statute 33 *Geo.* 3, c. 13, directs that the indorsement of the day on which an act receives the royal assent, shall be deemed as part of the act itself. In the case in *Fitzgibbon*, the Court held, that one part of the same statute may virtually repeal another; therefore, *a fortiori* is that doctrine applicable to provisions of distinct statutes, although passed in the same session; the priority of chapter is unimportant, and it may be explained by the local and general statutes being arranged in different classes. Here, the one is a local and the other a general act. The date of the royal assent is therefore the only legal criterion; and, in contemplation of law, as much deliberation is presumed to be given by the highest branch of the Legislature as by either of the others. The act of the 19th of *June* was therefore last under the considera-

(a) *Fitzgibbon*, 195; Bac. Ab. tit. "*Statute*," Dwaris on Statutes, Part ii. p. 661.

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tion of the Legislature, and, being inconsistent with the other, virtually repeals it.

Cur. adv. vult.

TENTERDEN, C. J., delivered the judgment of the Court. — We have considered the question arising upon the two statutes brought before our notice, and we are of opinion, that the case in *Fitzgibbon* is an authority sufficiently analogous to warrant us in saying, that the act which last received the royal assent, as far as it is inconsistent with the former one, must be held virtually to repeal it. The rule for a *mandamus* must therefore be made absolute.

Rule absolute.

Nov. 10th.

WILSON v. BACON, HETHERINGTON, and Another.

After the lapse of seven years, it is too late to take the objection, that a rule for a *sci. fa.* on a judgment more than ten years old has not been obtained.

Though a judgment is against several, a *hab. corp. ad satisf.* ought only to be issued against those who are in custody.

CRESSWELL shewed cause against a rule obtained by *C. Clarke*, to set aside the execution issued against *Hetherington*, one of the defendants, and for his discharge out of custody. The first objection was, that, though a judgment was signed in 1811, and execution was not issued till 1824, it does not appear that any *sci. fa.* had been sued out on the judgment. But this is a mere irregularity; and the defendant, after lying by seven years, is now too late to make the objection. The other objection is, that the *habeas corpus ad satisfaciendum* was against only two of the defendants, when the action and judgment were against three; and it was said, that it was like a *ca. sa.*, which is bad if sued out against two only of three defendants, when the judgment is against three; for it ought to follow the judgment. Upon the face of the writ, however, the suit and parties to it are correctly stated, and the writ was issued against two, because two only of them were in custody. If damages are recovered against two, and upon a

sci. fa. against them, one is returned 'summoned,' and makes default, and that the other has nothing, the execution of the whole may be against him who is returned summoned (a); but a *hab. corp.* does not require so much strictness as a *ca. sa.* (b).

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C. Clarke, in support of the rule, said it was sworn that the books had been searched, and no rule was found to warrant the issuing of a *sci. fa.*; and, according to the practice, the judgment being above ten years old, a rule was necessary before a *sci. fa.* could issue; and therefore, it must be presumed that there was no *sci. fa.* to warrant the execution. He cited 2 Tidd, 1105, 9th ed. to that effect. He contended that there was no material distinction between a *sci. fa.* and a *hab. corp.*, and that the latter was a species of execution of full as high authority as the former. He contended, that the execution was clearly irregular, as it ought to have been against all three; and he relied on the cases of *Davis v. Norton* (c); *Clarke v. Clement* (d), and *Buxton v. Martin* (e).

LITLEDALE, J.—The two writs of *sci. fa.* certainly cannot be supported, for there ought to have been a rule; but the defendant *Hetherington* is not in a condition to take the objection, for, after the lapse of seven years, he is much too late. As to the other objection, every execution ought to follow the judgment; but a *habeas corpus* is a

(a) Rol. Abr. tit. "Execution" (D).

(b) But in Rol. Ab. tit. "Execution" (E) 5, it is expressly said, that an execution ought to pursue the original, and that, if it was against several, the execution ought to be against them all jointly, and not against one only; and

therefore, in an assize against three, if one is taken by *capias* for the King's fine, the plaintiff cannot issue against him a separate execution for damages.

(c) 1 Bing. 133; 7 J. B. Moore, 499, S. C.

(d) 6 Term Rep. 525.

(e) 1 Term Rep. 80.

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very different writ from a *ca. sa.*, which must include all the defendants; but, from the form of the *habeas corpus*, which directs the Marshal to bring up the bodies of the persons in his custody, it is clear that it cannot apply to those who are at large. The writ here ought not to have issued against three, when two only of the defendants were in the custody of the Marshal.

Rule discharged, with costs (a).

(a) See 1 Reg. Gen. Hilary Term, 2 Will. 4, r. 39, *post*.

Nov 12th.

GRAY v. PENNELL.

The word "peremptorily," in a rule to declare, will only prevent a plaintiff from taking out more rules for time to declare; and therefore, if the defendant signs judgment of *non pros.* after the rule to declare has run out, but the plaintiff has declared, the judgment is wrong.

HUTCHINSON shewed cause against a rule for setting aside a judgment of *non pros.* The defendant had been arrested in *June*, 1830. The plaintiff had taken out several rules for time to declare, but was at last ruled "peremptorily" to declare, on the 13th *June*, 1831, that being the last day of *Trinity* Term. On that day, the plaintiff did not declare; but at about twenty minutes after nine o'clock on the morning of the 14th, a declaration was delivered: that was too late, and was refused acceptance; and on the morning of the 14th, after eleven o'clock, the defendant signed judgment of *non pros.* The declaration should have been delivered on the 13th, as the plaintiff was ruled to declare "peremptorily" on that day. In *Thompson v. Ryall* (a), where, to a plea of judgment recovered, the plaintiff replied *nul tiel record*, which he delivered with a rule to return the paper-book in four days; the rule expired on the *Saturday*, but the defendants did not offer to return the paper-book till the *Monday* morning following, before the opening of the Judgment

(a) 4 Term Rep. 195.

Office, when the plaintiff refused to receive it, and immediately signed judgment. The Court held the judgment regular, on the authority of *Haselar v. Ansell* (a).

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LITTLEDALE, J.—If the party deliver the pleading required, after the expiration of the rule, but before the opposite party signs judgment, that is sufficient. The case of a paper-book is an exception. It must be returned in four days: if it is not, you may sign judgment.

Hutchinson.—Then the word “peremptorily” means nothing.

LITTLEDALE, J.—It only means, that the party can take out no more rules for time to do the particular act required; and the party giving the rule may sign judgment when the peremptory rule has expired, if the opposite party has not taken the necessary step.

Platt, contra, was stopped by the Court.

LITTLEDALE, J.—The judgment is irregular; the rule must therefore be made absolute.

Rule absolute.

(a) 1 Doug. 197.

1831.

Nov. 12th.

CROSS v. MORGAN.

In an affidavit to hold to bail by an indorsee against the drawer, the default of the acceptor must be shewn.

DOWLING shewed cause against a rule for cancelling the bail bond, on filing common bail. The affidavit to hold to bail stated—" *William Stewart Morgan* is justly and truly indebted unto this deponent, in the sum of 50*l.* and upwards, upon and by virtue of a certain bill of exchange drawn by the said *William Stewart Morgan*, upon and accepted by one *George Dunman*, and payable to the order of the said *William Stewart Morgan*, and now over-due and unpaid." The objection to this affidavit was, that no default by the acceptor was alleged. But it was submitted, that such a default need not be shewn. For, in *Bradshaw v. Saddington* (a), an affidavit to hold bail stating that the defendant was "justly indebted to the plaintiff in 100*l.*, upon and by virtue of a certain bill of exchange drawn by the defendant, and long since due and unpaid," was holden to be sufficient, without stating in what character the bill was due to the plaintiff. Now, if it was not necessary to state in what character the plaintiff sued, whether as a payee or indorsee, he might have been suing in the character of indorsee, as in the present case. If it were so, then there was no default of the acceptor stated in that case, yet the Court held the affidavit sufficient. The Court there observed—"The affidavit stated the ground on which the plaintiff had holden the defendant to bail, that it was upon a bill of exchange drawn by the defendant, on which he was justly indebted to the plaintiff. It was not necessary for the plaintiff to specify in what particular character, whether as payee or indorsee, he claimed. If he had not an interest in the bill on which he could sue the defendant, he would be guilty of perjury, and would be liable to an action for maliciously holding the defendant to

(a) 7 East, 94.

bail." In the present case, if the plaintiff had no interest in the bill which would enable him to sue, he would be liable to an indictment for perjury, and an action for maliciously holding the defendant to bail. But in the case of *Elstone v. Mortlake* (a), where the affidavit to hold to bail stated that the defendant was indebted to the plaintiff on a bill of exchange, payable to a third person at a day now past, it was holden sufficient, without stating on what day the bill was payable, and without shewing the connection between the plaintiff and the payee. There, Mr. Justice *Best* observed—"It sufficed, if the plaintiff swore that the defendant was indebted to him; for, if he were not so, the defendant might indict him for perjury." On these grounds he submitted that the affidavit was sufficient.

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Channell, in support of the rule, cited *Buckworth v. Levy* (b), in which it was holden, that, in an action by the indorsee against the acceptor, the affidavit to hold to bail must allege the default of the acceptor. This case had since been acted on by the Court of *King's Bench*; and, therefore, although it was decided in the Court of *Common Pleas*, it must now be considered as an authority in this Court. Unless the acceptor's default were alleged in the affidavit, it did not disclose any cause of action.

LITLEDAL, J.—The case in the *Common Pleas* accords with my own opinion on the subject; and, therefore, the present rule must be made absolute.

Rule absolute (c).

(a) 1 Chit. Rep. 648.

(b) 7 Bing. 251

(c) See Reg. Gen. T. T. 1 W. 4, r. 8, *ante*, p. 104.

1831.

Nov. 14th.

It is sufficient, under the rules of *Trinity Term*, 1 *Wm.* 4, to state the residence of the bail for the last six months in the notice of bail, without repeating it in the notice of justification.

Higgs's Bail.

STEER opposed bail, on the ground, that the notice of justification did not state the residence of the bail during the last six months, which he contended was necessary under the new rules of *Trinity Term*, 1 *Wm.* 4 (a).

LITTLEDALE, J.—It is not necessary where the residence for six months has been stated in the notice of bail.

Bail justified.

(a) See Reg. Gen. *Trinity Term*, 1 *Wm.* 4, r. 2, *ante*, p. 103.

Nov. 14th.

The domestic servant of a foreign ambassador cannot become bail.

Lock's Bail.

COMYN opposed bail, on the ground of his being a domestic servant of the *Swedish* ambassador. In case it should become necessary to resort to process against the person to enforce the liquidation of the debt, he was privileged from arrest. The plaintiff would thus be deprived of his remedy (a).

LITTLEDALE, J., rejected the bail, but allowed time to add another, on producing an affidavit, that the defendant's attorney was not aware of the fact at the time of putting him in.

Bail rejected.

(a) 7 Ann. c. 12, s. 3; 1 Chit. Stat. 13.

1831.

OGDEN v. BARKER.

Nov. 14th.

TALFOURD shewed cause against a rule for cancelling the bail bond in this case, on the ground that the defendant had been improperly described in the writ. He was there described as "*William A. Turnbull*," and his affidavit states that he was christened "*William Archibald*," and that he was always called and known by those names. Now, he certainly was not "always" called and known by those names; for, he executed the bail bond by the names of "*William A. Turnbull*." No case has gone the length of deciding, that, in such a case as this, he would be entitled to his discharge. In the case of *Rolph v. Peckham* (a), a party had been served with process in which his initials only were introduced, and there the Court in giving judgment observed, that, "where the Christian name of a defendant is omitted in a bailable *latitat*, the Court on motion will set it aside for irregularity; but, where it is omitted in serviceable process, they will leave the party to his plea in abatement." Now, that was a case in which the defendant was arrested by his initials only. But, here the defendant was arrested by one Christian name, and the initial of another. In the case of *Reynolds v. Hankin* (b) also, the Court held that a person arrested by his initials only, was entitled to have the bail bond delivered up to be cancelled. That case was different, therefore, from the present, one of the names being here given at length. But, although the defendant here swears that he has always been called and known by the name of "*William Archibald*," it certainly is not usual, where a person has two Christian names, for his friends and acquaintance to employ both of them in addressing him. The only way, therefore, in which a man can be known by any two

If a defendant, having two Christian names, is arrested on process describing him by one at full length and the initial of the other, it is a ground for cancelling the bail bond.

(a) 6 B. & C. 164.

(b) 4 B. & A. 536.

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names, is by his signature. Here, he has signed the bail bond by the names of "*William A.*," and he is so described in the process. He is therefore described by the only names by which he can become usually known.

Thesiger, in support of the rule, was stopped by the Court.

LITTLEDALE, J.—Upon principle, it makes no difference whether both the Christian names are given by initials, or one name at full length and one by initial. The objection equally applies. He is described as "*William A.*," and his name is "*William Archibald.*" The bail bond must therefore be delivered up to be cancelled, the defendant undertaking to bring no action.

Rule absolute.

Nov. 15th.

ANONYMOUS.

Where there is a defect in the notice of bail, and further time is given to inquire as to them, and they ultimately justify, the defendant is not entitled to the costs of justification.

BAIL was opposed, on the ground that the notice of bail did not state that the bail were housekeepers or freeholders. Time was given to make further inquiries as to them, and the bail afterwards justified.

Busby now applied for the costs of justification, under *Reg. Gen.*, T. T. 1 *Will.* 4, r. 3 (a).

LITTLEDALE, J.—You had not complied with the rule in the first instance, and, therefore, there was ground of exception then. The plaintiff was therefore right in excepting to them, and, consequently, you are not entitled to costs.

(a) See *ante*, p. 103.

1831.

ANONYMOUS.

Nov. 16th.

BAIL was opposed, on the ground that the affidavit of sufficiency under *Reg. Gen.*, T. T. 1 *Will.* 4, r. 3(a), did not state them to be "housekeepers," but "householders."

Bail must swear themselves "housekeepers," swearing themselves "householders," is not sufficient.

LITTLEDALE, J.—That must be amended, and a fresh notice given.

(a) *Ante*, p. 103.

JOHNSON and Another v. DRIVER.

Nov. 17th.

WIGHTMAN shewed cause against a rule for discharging the defendant out of custody, and setting aside the proceedings in outlawry. The ground of the application was, that the defendant had been outlawed, although he appeared constantly during the period that proceedings were going on against him in various public places, so that there could be no difficulty in finding him.

The Court will not set aside an outlawry, merely on the ground of the defendant having constantly appeared in public during the proceedings against him. *Seemle*, that the Court would set it aside, if it appeared that the party had notice of them.

LITTLEDALE, J.—Is there any instance of the Court setting aside proceedings on this ground?

Platt, in support of the rule.—There was the case of *Biscoe v. Kennedy and Wife* (a). The report is this—"In debt on a bond entered into by the wife *dum sola*, the husband is gone abroad and outlawed, and the wife, although she appears publicly, is waived; and now it was moved to set aside the outlawry against the wife, and restore her the goods taken upon the *capias utlagatum*,

(a) 2 Wils. 127.

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which are sworn to be her separate goods; but, *per curiam*, we must take her goods to be her husband's in point of law; and if she has any equitable right to them, she must go to a Court of equity. As she appears publicly, she has been wrongfully outlawed; therefore, let the rule be made absolute for setting aside the outlawry against the wife, and be discharged as to restoring the goods." Unless the Court will interfere in such a case, its process may be made an instrument of malignity by any plaintiff.

LITLEDALE, J.—There is only one case cited in support of this rule. I never heard of such an application being favourably received. I should hesitate before I granted it. It is quite contrary to my notion. But, supposing it might be done, this does not appear to me a case wherein I should think it right so to do. The party had notice of the proceedings in outlawry. The rule must, therefore, be discharged, each party paying his own costs.

Rule discharged, without costs.

Nov. 17th.

GOODMAN v. ———

After nine terms have elapsed, it is too late to object that a party in custody for non-payment of poor rates, has been charged and detained on an attachment of privilege, without leave of the Court or a Judge.

Where a defendant is committed, under a *habeas corpus*, to the custody of the Marshal, it is not necessary to enter a *committitur* piece on the judgment roll.

THESIGER shewed cause against a rule for discharging a defendant out of the custody of the Marshal. The affidavit on which the application was founded, stated, that the defendant was in custody of the gaoler of the county of *Sussex*, on a commitment for non-payment of poor rates. On the 4th *May*, 1829, the plaintiff issued an attachment of privilege against him for 20*l*. Upon this attachment the defendant was charged and detained in custody, without leave of the Court or of a Judge. The

to the custody of the Marshal, it is not necessary to enter a *committitur* piece on the

plaintiff then proceeded to judgment. On the 6th of November, 1830, he caused the defendant to be brought up on a *habeas corpus*, and committed to the custody of the Marshal, without a *committitur* piece being entered on the judgment roll. To these proceedings two objections were made: *first*, that he had been originally charged in execution on an attachment of privilege without leave of the Court, or of a Judge; and, *secondly*, that he was afterwards committed to the custody of the Marshal without any *committitur* piece being entered on the judgment roll. As to the first irregularity, the objection comes too late.

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LITLEDALE, J.—Yes, they are too late to make that objection. Go to the second.

Thesiger.—It is not necessary that any *committitur* piece should appear on the judgment roll. Mr. Tidd (a), after stating the rule which requires such an entry to be made in the case of prisoners already in custody of the Marshal, says—"But the rule does not extend to the case of a prisoner committed under a *habeas corpus*, in which no *committitur* piece was ever necessary." For this statement he cites *Pitcher v. Faucett* (b), and 1 *Chitty's Reports* (c). The rule requiring the *committitur* piece to be entered on the judgment roll applies only to cases where the defendant is already in custody of the Marshal at the suit of the creditor.

Archbold, contra, cited *Purdom v. Brokbridge* (d), as shewing the necessity of a *committitur* being entered in all cases. Unless it was entered, the Marshal had no authority to keep a party in custody.

Cur adv. vult.

(a) 1 Tidd's Prac. 364, 9th ed.

(d) 2 B. & C. 342; 1 D. & R.

(b) T. 43 Geo. 3, K. B.

597, S. C.

(c) Page 365.

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LITLEDALE, J., directed the Clerk of the Treasury, and the Bag-bearer, to attend him in Court. They both appeared accordingly.

Nov. 19th.

Mr. *Edge*, the Clerk of the Treasury, said he had held his office fifty years, and it was his invariable practice to enter a *committitur* at the foot of the judgment roll. It was the practice so to do before the rule of 43 *Geo. 3* was made. The case which gave rise to the rule was an application to discharge a defendant out of custody, on the ground of a *committitur* not having been entered during term. The rule, therefore, gave the officers four days, as a reasonable time, beyond the term, to make the entry.

Mr. *Curtain*, the Bag-bearer of the Treasury, the successor of Mr. *Mitchell*, who had held the same office for forty-one years, stated, that it was always his practice to enter a *committitur* piece, if a detaining creditor proceeded to judgment, and afterwards charged the defendant in execution. But, if he was detained at the suit of another party, a *committitur* was not entered. He did not know why this distinction was made. If a defendant were in the custody of the Warden of the Fleet, and he was charged in execution in the custody of the Marshal, a *committitur* would not be entered. What he did was according to the directions of Mr. *Mitchell*.

LITLEDALE, J.—The terms of the rule are, that “the *committitur* on every judgment obtained against a prisoner in this Court, shall be filed with the clerk of the dockets, on or before the last day of the term in which the prisoner is charged in execution, and the said clerk shall enter such *committitur* on the judgment roll, within four days after the end of such term, exclusive of the last day of such term, unless the last day of the four shall be a *Sunday*,

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and, in that case, within five days next after the end of such term; and in default thereof, the prisoner shall be entitled to be discharged." It appears to me, from the terms of this rule, that it is confined to cases within the rule of 26 Geo. 3 (a), which requires, that "where a prisoner is in the custody of the Marshal, the plaintiff in the *King's Bench* shall proceed to trial or final judgment within three terms after the declaration delivered, and cause the defendant to be charged in execution within two terms after such trial or judgment." This view is confirmed by what Mr. *Edge* and Mr. *Curtain* say. Consequently, it does not apply to those cases, where the party is not in the custody of the Marshal at the time judgment is obtained against him. Mr. *Tidd* (b) lays it down—"but this rule does not extend to the case of a prisoner committed under a *habeas corpus*, in which no *committitur* piece was ever necessary." He cites Mr. Justice *Bayley's* judgment in *Rex v. The Sheriffs of Middlesex* (c), in which he says—"Where the party is not in the custody of the Marshal, but is in the custody of the Warden of the *Fleet*, and is brought up by *habeas corpus*, for the purpose of being removed from the *Fleet*, in order to be charged in execution in the *King's Bench*, the course of proceeding is, that the party is brought to the Judge's chambers, and the Judge makes out the *committitur* by *habeas corpus*. He is then carried with the *habeas corpus* to the *King's Bench* Prison, and then it is not necessary to make any entry of the *committitur*." Taking the whole together, I think it only applies to those cases where a party is detained in the custody of the Marshal, at the suit of the judgment creditor, when the judgment is obtained: a *committitur* was therefore not necessary to be entered here. The rule must therefore be discharged, but without costs.

Rule discharged, without costs.

(a) 1 *Tidd's Pract.* 360, 9th ed. (c) 1 *Chitty's Rep.* 359.

(b) *Id.* 364, 9th ed.

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Nov. 18th.

FERRALL v. ALEXANDER and ISAACSON.

If money has been paid into Court to abide the event of the suit under the 7 & 8 Geo. 4, c. 71, s. 2, and the defendant wishes to take it out on perfecting special bail, under s. 3, he must do so before issue joined. Money so paid in is not a payment to a creditor within the protection of the 6 Geo. 4, c. 16, s. 82. If paid in after an act of bankruptcy, and less than two months before a commission issued, it is not within the protection of 6 Geo. 4, c. 16, s. 81.

KELLY shewed cause against a rule requiring the plaintiff to shew cause why a sum of 70*l.* paid into Court in lieu of bail, under the 7 & 8 Geo. 4, c. 71, s. 2, should not be paid over to the assignees of the defendant, *Alexander*, under his bankruptcy. The facts are these:—the action was brought in the present year by the plaintiff against the defendants, who were proprietors of the *Morning Journal* newspaper, for work and labour in reporting for that publication. Special bail was put in on the 8th of *May*. It was excepted to, and notice of justification given for the 4th of *June*. Counsel was instructed to oppose, but the bail did not appear to justify. The time for rendering the defendant expired on the 4th of *June*. But, in the afternoon of that day, the defendant obtained permission to pay 50*l.* for the debt, and 20*l.* for costs, into Court, to abide the event of the suit. After that, the general issue was pleaded, and issue joined in *Trinity* Term. Five weeks' notice of trial was given, and the cause came on at the last *Summer* Assizes for the county of *Surrey*. The plaintiff obtained a verdict for 46*l.* 8*s.*; and but for this application would have had final judgment on the fourth day of this term. On the 13th of *July*, a commission of bankrupt issued against the defendant, and on the 6th of *August* assignees were appointed. On the 28th of *October*, he obtained his certificate. The bankruptcy took place after issue joined, and before trial. The application is on this ground, that, as after the certificate the bail might apply to enter an *exoneretur* on the bail piece, this money, which was paid into Court in lieu of bail, ought to be paid out. Whether the Court will order it to be paid out, depends on the construction of sections 2 and 3 of the 7 & 8 Geo. 4, c. 71. By s. 2, it is enacted, that "in all cases, where the defen-

dant shall have been arrested, and given bail to the sheriff, or shall have been arrested and remain in custody, it shall be lawful for such last-mentioned defendant, instead of putting in and perfecting special bail, to deposit and pay into the said Court the sum indorsed on the writ, together with the amount of the King's fine, if any, upon the original writ, and the further sum of 20*l.* as a security for the costs of the action, there to remain to abide the event of the suit." There is then a condition in sect. 3, on which it may be taken out of Court. By that section it is provided "that it shall and may be lawful for the said defendant, who hath made his election to make such deposit and payment as aforesaid, at any time in the progress of the cause before issue joined in law or fact, or final or interlocutory judgment signed, to receive the same out of Court, by order of the said Court, upon putting in and perfecting special bail in the cause, and payment of such costs to the plaintiff as the said Court shall direct." Now, I admit that though there is no provision of this act relating to assignees, or the case of bankruptcy; yet, by analogy, an application may be made to the equity of this Court to place the bankrupt and his assignees in the same situation as if special bail had been put in and perfected. But if this be a case in which special bail could not have been put in and perfected; and so the money could not have been taken out, the assignees are not entitled to take this money out of Court. Now, by the terms of this statute, it would be too late to put in and perfect special bail after issue had been joined. Here, issue had been joined before the bankruptcy of the defendant, and therefore it would be too late to make such an application on the part of the assignees, who can only have the same rights as the bail, if put in. The statute, by using the words "made his election," clearly contemplates a party being bound by his election, unless, before certain steps in the cause have been taken, he puts in and perfects special bail; for, he gains great

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advantages by paying in this money in lieu of bail, he saves the expense of that proceeding, and risks only 20*l.* for costs, whereas they generally amount to much more. Could bail have been put in on the 3rd of *November*? Certainly not. The words "final or interlocutory judgment signed," do not here apply. I submit, the passage means, that where issue is joined, the party must make his election before issue is joined; but where no issue is joined, it must then be before final or interlocutory judgment—*reddendo singula singulis*.

LITLEDAL, J.—Supposing there was a declaration merely, how then?

Kelly.—It is then perfectly clear that he may come in, because it does not there appear whether issue is joined or not. The assignees therefore having no right, unless the bail had been put in before issue joined; and bail not having been so put in, they have now no right to have this money paid over to them. Then, on the subject of costs, the 3rd section provides that the defendant shall be allowed to make this election only on the "payment of such costs to the plaintiff as the said Court shall direct." These should be all the costs to which the plaintiff has been put in making the application.

Thesiger and *Humfrey*, in support of the rule.—The words of the latter part of s. 2 of 7 & 8 *Geo.* 4, c. 71, are—"if judgment be given in the said action for the defendant, or the plaintiff discontinue his suit, or be otherwise barred," "the said money," "so paid into Court shall, by order of the Court by motion to be made for that purpose, be repaid to such defendant." Here the plaintiff is clearly "barred." The defendant's having obtained his certificate is a bar. The plaintiff, if he had chosen, might have come in and proved his debt. But, by looking at the

bankrupt act, 6 *Geo.* 4, c. 16, s. 63, there cannot be the slightest doubt on the subject. Under that act, by the assignment of the 26th of *July*, the assignees became absolutely entitled to the bankrupt's personal estate. Now, was this 70*l.* ever part of the personal estate of the bankrupt? Undoubtedly it was, and was merely in Court to abide the event of the suit. Until the suit was determined, it was uncertain whether it was to be paid over to the bankrupt or to the plaintiff. Now, it would be very remarkable, if the plaintiff here were to be in a better situation than a person having a security for his debt. By the 6 *Geo.* 4, c. 16, s. 108, it is provided, "that no creditor having security for his debt, or having made any attachment in *London*, or any other place, by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive, upon any such security or attachment, more than a rateable part of such debt." He therefore was only entitled to receive, like other creditors, a rateable part of his debt, if he had thought proper to prove it. He cannot contend that he has any lien on this money: it is a mere security; and he must stand in precisely the same situation as any person who has a security. This money was paid into Court in place of bail, and therefore subject to all the liabilities and possessing all the equities of bail. Now, undoubtedly, if bail had been put in, they would have been entitled to be discharged. This money, possessing the same equities as bail, ought to be paid out of Court to the assignees, and the plaintiff ought not to be allowed to receive it, to the prejudice of the other creditors.

Cur. adv. vult.

LITLEDALE, J.—This was a rule obtained by the assignees of *Alexander*, calling on the plaintiff to shew cause why a sum of 70*l.*, paid into Court in lieu of bail, should not be paid out to them. The facts, as they relate to the

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question before the Court, are these:—The writ was returnable in *Trinity* Term. The time for perfecting bail expired on the 4th of *June*. Bail did not justify; and on the same day the defendant obtained a rule to pay money into Court in lieu of bail, under 7 & 8 *Geo.* 4, c. 71, s. 2. Notice of trial was afterwards given. On the 13th of *July*, a commission of bankrupt issued on an act of bankruptcy committed before the money was paid into Court. On the 26th the assignment was made. On the 27th, notice was given to the plaintiff that an application would be made to this Court, to have this money paid out to the assignees. On the 28th, notice was given to the plaintiff that he might come in and prove his debt. On the 4th of *August*, the trial took place; and on the 20th *October*, the defendant obtained his certificate. On the 2nd *November*, the present application was made to this Court by the assignees, to have this money paid out to them, under the 7 & 8 *Geo.* 4, c. 71, ss. 2, 3. The words of sect. 2 are, that, “in all cases where a defendant shall have been arrested and shall have given bail to the Sheriff, or shall have been arrested and remain in custody, it shall be lawful for such” “defendant, instead of putting in and perfecting special bail, to deposit and pay into the said Court the sum indorsed upon the writ, together with the amount of the King’s fine, if any, upon the original writ, and the further sum of 20*l.*, as a security for the costs of the action; there to remain and abide the event of the suit.” By section 3 it is provided, “that it shall and may be lawful for the defendant who hath made his election, to make such deposit and payment as aforesaid, at any time in the progress of the cause, before issue joined in law or fact, or final or interlocutory judgment signed, to receive the same out of Court, by order of the said Court, upon putting in and perfecting special bail in the cause, and payment of such costs to the plaintiff as the said Court shall direct.” The first question on the construction of this statute is,

whether, if no bankruptcy had taken place, the defendant would be entitled to take the money out of Court. I think he would not. He applies before final judgment. But the act did not mean that the defendant should have power to come in just before final judgment had been signed. I think the application should have been made before any one of the events mentioned in the statute had taken place. It should have been made before issue joined. The defendant is therefore concluded, and too late to make this application.

Then the question is, whether the bankruptcy makes any difference. The assignees say, that, as the money here was paid into Court in lieu of bail, it must be in the same situation as bail; and as bail would be relieved, this money ought to be paid out of Court. But the cases are not on the same footing. The bail could have rendered their principal at any time before they were fixed. The Court, to prevent the circuity of proceeding, relieve the bail in such cases; but it cannot relieve money. The reasoning does not apply. If the money is bound, the assignees are bound. On the construction of the 2nd and 3rd sections of this act, therefore, I think the assignees are not entitled to have this money out of Court.

But, if the assignees are driven from this point, they put their claim on another ground, namely, that the money was paid into Court after an act of bankruptcy; and therefore, as a commission issued within two months after the payment, it is not protected by sect. 81 of the 6 Geo. 4, c. 16, nor can it be considered as a payment to a creditor, so as to be protected by sect. 82 of that act. I think it cannot be considered as a payment to a creditor; and, as a commission issued within two months after the transaction, the plaintiff cannot avail himself of sect. 81. The plaintiff, then, is not entitled to have this money out of Court, nor are the assignees entitled to have it out, under sect. 3 of the 7 & 8 Geo. 4, c. 71. But the money is in Court. If the Court

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sees clearly, that, under the 6 *Geo.* 4, c. 16, s. 63, the assignees are entitled to this money, it may exercise its equitable discretion, and order it to be paid over to the assignees.

As to the costs, since the assignees do not obtain this money directly under the 7 & 8 *Geo.* 4, c. 71, but through the equitable jurisdiction of the Court, I think there was fair ground, on the part of the plaintiff, to object to this money being paid over to the assignees, without the discretion of this Court being exercised. The assignees, therefore, ought to pay the costs of this application.

This rule was moved in the other Court. I have spoken to the other Judges on the point, and they take the same view of it that I have taken.

Kelly informed the Court, it was not admitted that the payment had taken place after the act of bankruptcy.

LITLEDALE, J.—Let it, then, be referred to the Master to ascertain that fact, and the rule enlarged till the first day of next term.

Rule enlarged.

On the first day of *Hilary* Term, it having been ascertained that the payment had been made after the act of bankruptcy, the rule was made absolute.

Rule absolute, the assignees paying the costs of the application.

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CHAMBERS v. WARD.

Nov. 19th.

CROWDER shewed cause against a rule for discharging a defendant out of the custody of the Sheriff of *York*, on the ground of a defect in the affidavit to hold to bail. The affidavit stated, that the defendant was indebted to deponent in the sum of 20*l.* on articles of agreement in a bond or writing obligatory, whereby the defendant, *George Ward*, bound himself in the sum of 20*l.*, to be recovered "as liquidated damages," and that the said *George Ward* had broken the same by neglecting to make certain weekly payments. In the case of *Willey v. Thornton* (a) it was holden, that an affidavit to hold to bail for a certain sum for the breach of an agreement, must shew, that the sum is stipulated damages, and not a mere penalty. Lord *Ellenborough* there said, "the rule is clear, that, for stipulated damages, a defendant may be holden to bail." Now here the 20*l.* was stated to be stipulated damages, and therefore the affidavit was sufficient.

The affidavit of debt on a bond, must shew that the number of defaults in payment amounts to 20*l.*

TAUNTON, J.—There is no pretence for holding a man to bail on such an affidavit. The plaintiff has thought proper to call these liquidated damages, which are not so in point of law, unless you shew that the defaults in payment amount to 20*l.*, and that must appear on the affidavit. His merely calling them liquidated damages does not make them so in point of law.

Rule absolute.

(a) 2 East, 409.

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Nov. 19th.

In the matter of MILLARD.

The Court will not, on a summary application, compel an attorney to deliver up, on payment of what is due to him, deeds which have been intrusted to him for the purpose of raising money upon them.

B. ANDREWS shewed cause against a rule requiring **Mr. Millard**, an attorney of the Court, to shew cause why he should not deliver up certain title deeds belonging to a **Mr. Candler**, deceased, on payment of all costs that might be found due on taxation. **Mr. Millard** had been employed by the trustees of **Mr. Candler's** estate to raise money upon it. The deeds were laid before a conveyancer, and the title not appearing satisfactory, the money was not advanced. It was contended, on the other side, that he was solicitor to the mortgagee; but **Mr. Millard** had never acted on his part, but on the part of the trustees. The latter, therefore, were bound to pay him. He had a lien on the deeds for what was due to him as a solicitor, and the Court would not interfere to make him deliver them up. He cited *Ex parte Lowe (a)*, where it was decided, that the Court will not compel an attorney upon a summary application to deliver up, upon payment of his demand, a lease put into his hands for the purpose of making an assignment of it.

Campbell, contra, contended, that the deeds had come tortiously into the possession of **Mr. Millard**, and therefore the Court should interfere.

TAUNTON, J.—I do not see that he came into the possession of them tortiously. He says, you are bound to pay him, and that he has a lien on these deeds. That can only be determined by a jury. The Court cannot interfere to try the question of lien.

Rule discharged, without costs.

(a) 8 East, 237.

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FRASER v. MILLER.

Nov. 21st.

PLATT shewed cause against a rule for setting aside a *scire facias* against bail, on the ground, that it had not lain four juridical days in the Sheriff's office. The *sci. fa.* had lain *five* days, including the return-day, in the Sheriff's office. A *Sunday*, however, intervened. The question was, whether the *Sunday* was to be reckoned one day. He submitted that it was. In the case of a *capias ad satisfaciendum* against bail, the four days were to be reckoned exclusive of *Sunday*; but it was not so in the case of a *sci. fa.*, no search being necessary, the return being *scire feci*, and not *nihil*. No case decided, that, in the instance of a *sci. fa.*, *Sunday* was to be considered exclusive. In the case of a *ca. sa.*, there was some reason why the four days should be exclusive of *Sunday*, namely, to give an opportunity to serve notice of bail within four days.

A *sci. fa.* should lie four juridical days in the Sheriff's office.

LITLEDALE, J.—It would seem that they should be exclusive of *Sunday*, by analogy to the cases mentioned in *Tidd*.

Platt.—Those cases do not apply to a *sci. fa.*

Kelly in support of the rule.—The *sci. fa.* must lie four days exclusive of *Sunday* in the Sheriff's office (a). In a note to the case of *Clark v. Bradshaw* (b), it was laid down on the authority of a case of the name of *Williams v. Mason*, M. 4 Geo 2; that it was settled that the *scire facias* must lie four days in the office, as well where *scire feci* is returned, as *nihil*. What those days must be, was decided in *Scott v. Larkin* (c). There, *Holy Thursday* was an intervening day, and the Court held that it ought not to

(a) 1 Chit. Prac. 207.

(b) 1 East, 89.

(c) 7 Bing. 109; S. C. 4 Moore & Payne, 748.

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be reckoned one of the four days. All the days ought to be searching days, but a *Sunday* was not such a day.

Cur. adv. vult.

LITLEDALE, J.—I have looked into the cases on this subject, and I am of opinion that the four days ought to be reckoned exclusive of *Sunday*.

Rule absolute, without costs.

Nov. 22nd.

ANONYMOUS.

In all proceedings by *scire facias*, *Sunday* is not to be reckoned.

GEORGE, on a former day, had obtained a rule *nisi*, to set aside a judgment in *scire facias* for irregularity, on the ground, that, in the rule for judgment, an intervening *Sunday* was reckoned as one of the four days.

Addison now shewed cause, and contended, that there was a distinction between this case and the one previously decided by the learned Judge, of *Fraser v. Miller* (a), inasmuch as that was a *sci. fa.* against bail, and this was not against bail; that all the cases in which *Sunday* was excluded, were cases in which bail were charged; that the Courts were always more strict, where the proceedings were against bail, than in common cases. He cited *Wathen v. Beaumont* (b), where the distinction is drawn. He contended, that, in rules of this sort, *Sunday* is reckoned as one of the days, unless it happens to be the last.

George, in support of the rule, cited *Wathen v. Beaumont* (b), and *Goodwin v. Lugar* (c), where it was held,

(a) *Ante*, p. 141.

(b) 11 East, 272, n. (b).

(c) 6 M. & S. 135; 2 Chit. Rep. 192.

that in *sci. fa.* an intervening *Sunday* was not to be reckoned, and that the rule had been no where held to apply specifically to cases of bail.

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LITTLEDALE, J.—I am of opinion that *Sunday*, though an intervening day, cannot be reckoned as one of the four days. The rule of 5 *Geo. 2*, was general, and all proceedings by *sci. fa.*, whether against bail or for other purposes, ought to be governed by the same principle: and the judgment must therefore be set aside. But, as it is a doubtful point, without costs.

Addison wished to add the condition of bringing no action, execution appearing to have been issued.

LITTLEDALE, J., imposed this condition, but said, that the plaintiff must then pay the costs of the rule.

Rule absolute without costs, the defendant bringing no action.

DOE *d.* SIR NICHOLAS CONYNHAM TINDAL *v.* ROE.

Nov. 23rd.

(*Before the four Judges*).

THIS was an ejectment brought to recover possession of a farm in *Essex*. *Amory Pratt*, the tenant in possession, held it under a lease from the lessor of the plaintiff for a term which had not expired, but which had been surrendered by a trustee, to whom *Pratt* had assigned the lease for the benefit of creditors. Upon this surrender being made, the lessor of the plaintiff demanded possession in writing, according to the terms of 1 *Geo. 4*, c. 87. The tenant refused to give up possession, on which the present ejectment was brought. The lessor of the plaintiff caused to be given the usual notice of motion, under

The 1 *Geo. 4*, c. 87, requiring tenants holding over to give security and enter into recognizance, only applies to cases where the tenancy is under lease, and has expired by effluxion of time; or under an agreement from year to year, if the tenancy has been determined by a regular notice to quit.

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the above statute, to compel the tenant, in case he should seek to defend; to enter into the usual recognizances provided by the act. A rule to shew cause to that effect having been obtained by *Campbell*—

Barstow shewed cause.—The present case is not within the terms of the statute in question. That statute has given to the landlord the extraordinary remedy now sought, in only two cases: the one where the lease is for a term of years, and has expired, the word “expired” evidently meaning an expiration by effluxion of time; the other, where the tenancy is from year to year, and determined by a regular notice to quit. The Legislature throughout has used the term “expired” as applicable to leases, and “determined” as applicable to a yearly tenancy. The distinctive use, therefore, of “expired” and “determined” shews most clearly, that where the tenancy is by lease for a term certain, a determination of the lease, either by landlord or tenant, would not be a case in which the Legislature intended to provide a remedy. This also appears about the middle of the section, where it is provided, that the Court, upon production of the lease, shall, under the circumstances there directed, cause the security to be given. Now, if it had been intended that it should be done under any other circumstances than those of the expiration of the lease by effluxion of time, as, for instance, in the present case, by surrender, it is reasonable to infer that the provision would have been upon the production not only of the lease, but of any instrument by which the same was determined. As the present rule is drawn up on the mere production of the lease, nothing would appear but a subsisting lease. It may also be reasonably concluded, that this extraordinary remedy was not intended to be given where the matter in dispute between the landlord and the tenant was of any thing but the simplest nature, because it could not be expected that the Court would try any real

matter in difference upon affidavit. The statute should be construed strictly as to calling on any man to give security before he is allowed to defend his own possession. That appears by every case which has been decided on the act. In the case of *Doe d. Pemberton and Others v. Roe (a)*, in which a similar application to the present was made, it appeared, that the tenant held under a lease for ninety-nine years, if certain persons should so long live. There, Lord *Tenterden* said—"The statute only applies to cases where the holding is for any term or number of years certain, or from year to year. I think that, under the lease in question, there was not a holding for any term or number of years certain. The case, therefore, does not come within the operation of the act of Parliament, and we cannot call upon the tenants to give security." Yet, in that case there was less difficulty than there could be in the present, inasmuch as the determination of the term in that case by the dropping of the lives, was a part of the compact between the parties when the lease was made. The mere fact of the lives having dropped can scarcely be a subject seriously in dispute. But the case of *Doe d. Cardigan v. Roe (b)* seems to be expressly in point. There, the tenant held the premises in question of his landlord on a lease for fourteen years, determinable at the end of seven years; the tenant had given notice to his landlord of his intention to quit, which was accepted by the landlord; but when the notice had expired he refused to give up possession, and the question was, whether the case came within the statute. The Court were of opinion, "that the statute clearly applied only to cases where the lease or term had expired by mere effluxion of time, and not to a tenancy determinable by notice to quit, either from or to the landlord, where there was a subsisting lease, and therefore refused the rule." But, suppos-

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(a) 7 B. & C. 2.

(b) 5 D. & R. 540. See Chit. Prac. 228.

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ing that this should be a case in which the Court conceived that it has this discretion, the present is one in which it would not think it right to exercise that discretion.

The Court here stopped *Barstow*.

Campbell, in support of the rule.—This is a case clearly within the mischief of the act and the terms of the preamble. It states, that "the laws heretofore made for preventing the losses to which landlords are exposed by the unlawful holding over of lands and tenements by tenants or persons claiming under them, after the expiration or legal determination of their terms or interest, having been found by experience to be insufficient;" and then it goes on to provide a remedy for those mischiefs. Now, it is most clear, that the interest of this man has been determined, and the fact is not pretended to be denied. Undoubtedly, in the subsequent part of the section, the word "interest" is omitted, but the Court will deal with the section as one entire sentence, and see the mischief intended to be remedied. It will not abridge the remedy of the landlord merely on account of the omission of a word. Besides, the construction put by the other side on the word "expired," is not a proper one. For this purpose, "expiration" and "determination," may fairly be considered as synonymous. The difficulty is on account of the case of *Doe d. Cardigan v. Roe*. But if the Court should be of opinion, that the present case is really within the act of Parliament, and substantially though not critically within the words of the statute, they will reconsider the case, and give to the landlord that remedy to which he is fairly entitled.

LORD TENTERDEN, C. J.—I am of opinion, that the statute empowering the Court to give the landlord the extraordinary remedy now desired, applies only to cases where

the tenancy, if by lease, has expired by effluxion of time, or if by a yearly tenancy, where it has been determined by a regular notice to quit. The present may be a case within the hardship intended to be remedied by this statute, but the words used to give the remedy do not extend to this case. The words used by it are clear and unambiguous, and I see no reason to disapprove of the determination to which it is admitted the Court came, in a case precisely the same as the present.

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PARKE, J.—I own, that if it were not for the case of *Doe d. Cardigan v. Roe*, I should be of opinion, that this was a case not only within the mischief, but within the fair meaning of the terms of this act. But after the decision in that case, which decision has been acquiesced in for some time, I think it better to observe uniformity in the practice, and not overrule that determination by going out of the words into that which we may conceive to be the substantial meaning of the act. I concur, therefore, with my Lord Chief Justice, that this rule should be discharged.

TAUNTON, J.—I think, with my Lord Chief Justice, that, independently of the case of *Doe d. Cardigan v. Roe*, the act of Parliament very clearly refers to only two cases; one, where, the tenancy being by lease, the lease has expired by effluxion of time; the other, where the tenancy is from year to year, and has been determined by a regular notice to quit.

PATTESON, J.—I am of the same opinion. It appears to me that the words of the act are very clear, and there is no reason whatever to dissent from the construction put upon them by the Court in the case of *Doe d. Cardigan v. Roe*.

Rule discharged, without costs.

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Nov. 24th.

ANONYMOUS.

Where an application to discharge a debtor out of custody, under the 48 Geo. 3, c. 123, is successfully opposed on notice, no costs are allowed.

BUSBY moved under 48 Geo. 3, c. 123, to discharge a debtor who had lain in prison twelve months, for a sum not exceeding 20*l*.

Ball appeared on notice to oppose the application. He produced an affidavit, which shewed that the defendant was in custody for a debt exceeding 20*l*.

LITLEDALE, J., refused the rule accordingly.

Rule refused.

Ball then applied for costs.

LITLEDALE, J.—Costs are never allowed on shewing cause on notice (*a*).

(*a*) So, also, costs are not allowed where cause is shewn in the first instance.

Nov. 24th.

SULSH v. CRANBROOK.

In all cases of peremptory undertaking to try, a fresh notice of trial should be given, though the cause remains in the paper.

HUTCHINSON shewed cause against a rule for discharging a rule for judgment as in case of a nonsuit absolute. A notice of trial had been given for the third Sitting in *Trinity* Term. On the 1st of *June*, a rule *nisi* for judgment as in case of a nonsuit was obtained, and, on the 6th of *June*, a peremptory undertaking was given to try at the Sittings after *Trinity* Term. No new notice of trial for the Sittings after *Trinity* Term was given. The cause was not tried but still remained in the cause paper. On the 8th of *November* the rule for judgment as in case of a nonsuit after a peremptory undertaking was obtained.

LITTLEDALE, J.—If there has been an existing notice of trial, is it necessary to give a new notice of trial?

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Hutchinson.—That was at a former Sittings. The peremptory undertaking was a waiver of that notice.

Ball, in support of the rule, contended that the peremptory undertaking was a continuation of the notice of trial. He cited *Shepherd v. Butler (a)*, *Ham v. Greg (b)*.

Cur. adv. vult.

LITTLEDALE, J.—The question here is, whether it is necessary to give a fresh notice of trial, where a peremptory undertaking has been given. I have examined the cases and the books of practice, and I think it is much more convenient, that, in all cases of peremptory undertakings, the plaintiff should be bound to give a fresh notice of trial, though the cause is in the paper.

Nov. 25th.

Rule discharged.

Ball then applied for and obtained a rule for discharging the rule for judgment as in case of a nonsuit, on payment of costs, and giving a peremptory undertaking to try at the next Sittings.

(a) 1 D. & R. 15.

(b) 6 B. & C. 125.

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ANONYMOUS.

Where a defendant has been charged in execution on the 26th Nov. 1830, for a debt not exceeding 20*l.*, and has continued in prison until the 25th of Nov. following, he is entitled to his discharge under the 48 Geo. 3, c. 123, on that day.

THESIGER moved to discharge a defendant out of custody, under the 48 Geo. 3, c. 123, who had lain in prison twelve successive calendar months, for a debt not exceeding 20*l.* The defendant had been taken in execution on the 26th November, 1830; and the day on which he moved was the 25th November, 1831. He submitted, on the authority of *Glassington v. Rawlins* (a), that the defendant was entitled to his discharge. There the Court held, that, where time is to be computed from an act done, the day on which such act is done is to be included in the computation. Therefore, where the statute of 21 Jac. 1, c. 19, s. 2, enacts, that a trader lying in prison two months, that is, lunar months, after an arrest for debt, shall be adjudged a bankrupt, that includes the day of arrest.

Mr. *Robinson*, the Master of the Crown Office, stated to the Court, that, if a man were sentenced to be imprisoned on the 26th November, for twelve months, he would be entitled to his discharge on the 25th of November following.

LITLEDAL, J.—He is entitled to his discharge.

Rule granted.

(a) 3 East, 407. See also *Pel- 603; Lester v. Garland*, 15 Ves.
lew v. Inhabitants of Worsford, 9 247; Chit. Pract. 14.
 B. & C. 134; *Hardy v. Ryle*, Id.

END OF MICHAELMAS TERM.

Hilary Term.

IN THE SECOND YEAR OF THE REIGN OF WILLIAM IV.

The MAYOR and BURGESSES of the Town and Borough of
KINGSTON UPON HULL *v.* BUBB.

1832.

(*Before the four Judges*).

Jan. 11th.

COLTMAN applied for a rule to shew cause why the *latitat*, and the proceedings thereon, should not be set aside for irregularity. The irregularity was, that the writ was directed to the Sheriff, who was one of the plaintiffs. He submitted, that it ought to have been directed to the Coroner. He cited *Weston v. Coulson* (a), and *Grant v. Bragge* (b).

Serviceable process may be directed to a sheriff who is a party in a cause.

Lord TENTERDEN, C. J.—The Sheriff is not troubled with the execution of serviceable process. He has nothing to do on it. In all the cases where the process has been directed to the Coroner, it has been because the Sheriff was a party, and there was something which the Sheriff was required to do. The process is therefore regular.

Rule refused.

(a) 1 Sir W. Blackst. 506.

(b) 3 East, 141; 1 Tidd, 151, 9th ed.

1832.

Jan. 12th.

Taxation of costs, without payment of them after a summons to discontinue, is no discontinuance.

EDGINGTON v. PROUDMAN.

V. RICHARDS applied for a rule to shew cause why the plaintiff should not enter judgment of discontinuance as of the 3rd of *December* last, and carry in the judgment roll, and pay costs subsequently incurred, the costs of the present application included. The plaintiff had, on the 3rd of *December*, served a rule to discontinue, on payment of costs. An appointment to tax was made, and the costs taxed. The costs were not paid, and the plaintiff proceeded with the action. At the trial, the counsel attended, and protested against the cause being tried. The Judge who tried the cause overruled the objection, and a verdict was obtained by the plaintiff. The taxation of costs, he submitted, was a discontinuance. In *Whitmore v. Williams* (a), the Court held, that serving a rule to discontinue was not a discontinuance, without an appointment to tax costs. From this case it would appear, that, if there were an appointment to tax costs, that appointment would operate a discontinuance. There was an appointment here, and therefore a discontinuance was wrought. In *Molling and Others v. Buckholtz* (b), it was decided, that the discontinuance of a former action was not complete, so as to entitle the plaintiff to arrest the defendant upon a fresh writ, until the plaintiff had taxed the costs. From this decision, also, it appeared that the taxation of costs was a discontinuance.

PARKE, J., (after consulting with the Master).—The taxation of costs, without payment of them, is not a discontinuance. The words of the rule are, “upon payment of costs.” The condition of the discontinuance is therefore not fulfilled without payment, and, consequently, no dis-

(a) 6 Term Rep. 765.

(b) 3 M. & S. 153.

continuance has taken place. The taking out of the rule to discontinue, and the taxation of costs, only amount to an offer to do something which is not done.

1832.
EDGINGTON
v.
FROUDMAN.

Rule refused.

V. Richards then applied for a rule to shew cause why a new trial should not be had, on the ground of surprise. He admitted that he had no affidavit of merits.

PARKE, J.—Then I cannot grant you a rule.

Rule refused.

GILBERT v. KIRKLAND.

Jan. 19th.

N. CLARK shewed cause why the declaration should not be set aside, on the ground that it had been filed absolutely after the time for appearing by the defendant had expired, without the plaintiff's filing common bail, according to the statute. The declaration was indorsed conditionally, but the notice was of its having been filed absolutely. However, although an irregularity might have been committed by the plaintiff, the defendant had waived it, by taking the declaration out of the office.

Where a plaintiff had declared conditionally after the time for the defendant's appearing had expired, and the defendant took the declaration out of the office:—
Held, a waiver of the irregularity.

White, in support of the rule, submitted, that it was a clear irregularity. If the declaration was filed absolutely, it was irregular; for no common bail had been filed. If filed conditionally, it was irregular, because it was filed conditionally after the time for appearance was out. So, *quâcunque viâ datâ*, the declaration was irregular. As to the waiver by taking the declaration out of the office, it

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GILBERT
v.
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was none, because the defendant could not know whether the declaration was absolute or conditional, without taking it out. He could not, therefore, have waived an irregularity by taking the declaration out of the office, when it was only by so doing that he could become acquainted with it.

PARKE, J., inquired, whether, by the practice of the office, the defendant could have an opportunity of seeing the declaration before he took it out. If he had such an opportunity of seeing the declaration before he took it out, it was a waiver to take it out; if not, it was no waiver.

The officers in Court not being able to give his Lordship the required information, he took time to inquire in the office.

Cur. adv. vult.

Jan. 20th. PARKE, J.—I have inquired as to the practice of the office, and find that the defendant has an opportunity of seeing the exterior of the declaration. Now, he could have seen by the indorsement if it were filed conditionally; and therefore, taking the declaration out of the office after an opportunity of seeing that indorsement, was a waiver. The rule must therefore be discharged.

Rule discharged.

1832.

ANONYMOUS.

Jan. 20th.

ARCHBOLD shewed cause against a rule obtained by *White* for cancelling the bail bond on filing common bail, on the ground of a defect in the *ac etiam* part of the bill of *Middlesex*. The words of the writ were, "and also to a bill to be exhibited for 50*l*." omitting the words "on promises." This was no ground for cancelling the bail bond on filing common bail, but merely for reducing the amount of the bail's recognizance to 40*l*. The words of the 13 *Car. 2*, st. 2, c. 2, are "That all Sheriffs shall let to bail every person by them arrested upon any such writ, bill, or process wherein the certainty and true cause of action is not particularly expressed, upon security in the sum of 40*l*. and no more." Here "the certainty and true cause of action" is not expressed; and, therefore, bail to a greater amount than 40*l*. cannot be required. The present case differs from that of *Mayfield v. Davison* (a), and *Powell v. Jenkins*, decided in *Michaelmas* Term before the four Judges. There, it was decided on the ground of variance between the *ac etiam* and the bill, in the description of the form of action, that the defendant was entitled to have the bail bond cancelled on filing common bail. Here the objection is not on the ground of variance, but that the *ac etiam* itself is deficient. Therefore, by the terms of the statute of *Charles*, the defendant is only entitled to have the recognizance of the bail reduced to 40*l*.

If the *ac etiam* omit the words "on promises," the defendant can be holden to bail in the amount of 40*l*. only.

Seemle, if he has been holden to bail in a greater amount than 40*l*., the Court will reduce the recognizance to that sum.

White, contra, cited *Munroe v. Howe* (b), where an application on precisely the same ground was made, and the Court directed the bail bond to be delivered up to be cancelled. There Lord *Tenterden* observed, "this may be a bill of trespass, and not upon promises. It is quite

(a) 10 B. & C. 223.

(b) 1 Chit. Rep. 171.

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 ANONYMOUS.

clear the particular cause of action must be expressed in the *ac etiam* clause." The same observation applies here, if a man has no right to arrest another in an action of trespass. Yet, for any thing that appears on the face of the writ, the action might be in *trespass*.

PATTESON, J.—Supposing there had been no *ac etiam*, would you have asked me to presume that it was in *trespass* or *case*. I must presume it was for a debt. If the arrest were in either of those forms of action it would be under a Judge's order, and it would so appear on the process.

White.—The process is indorsed to arrest for 21*l.* 4*s.* 6*d.* The plaintiff would, if this statement in the writ were sufficient, be entitled to demand bail for 42*l.* 9*s.* And it must be presumed that he has demanded; and obtained bail to that amount, as it is the constant practice of the Court to require bail in double the amount for which the defendant is arrested.

PATTESON, J.—You should shew me by an affidavit that the bail bond was taken in that amount.

White.—It lies on the plaintiff to shew that it was not taken for more than 40*l.*

PATTESON, J.—In both *Mayfield v. Davison* and *Powell v. Jenkins*, the decision of the Court was founded solely on the ground of variance. I must take the case here, that there is no *ac etiam* at all; and, therefore, by the statute of *Charles 2*, the defendant can only be bound to give bail to the amount of 40*l.* If he has been called upon to find bail to a greater amount, that might appear on an affidavit. I must presume all things rightly done until the contrary be shewn. It is not shewn, and, therefore, the rule must be discharged. But I am by no means prepared to say,

that, if he had been holden to bail in a greater amount than 40*l.*, the recognizance would not have been valid to the extent of 40*l.* The observation attributed to Lord *Tenterden* in *Munroe v. Howe*, he never could have made. The reporter must have mistaken him (a).

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(a) See 1 Reg. Gen., H. T. 2 Will. 4, r. 13.

— *Harr. & Hy. Co. L. J. Q. B. 185.*

ANONYMOUS.

Jan. 21st.

ADOLPHUS shewed cause against a rule for discharging a defendant out of custody, on filing common bail, on the ground of his having been arrested in returning home, after having been discharged from criminal custody for a felony. The defendant had been charged with stealing a sum of money, and tried at the *Old Bailey* Sessions. It was a case of constructive felony. He was acquitted, and discharged immediately. On his way from the Court, he was arrested for the sum of money which formed the ground of the criminal proceeding. The question was, whether he was entitled to such protection on his way home from lawful custody, as would render his arrest illegal. There was no case to shew that a defendant was so privileged. The nearest to it was *The King v. Priddle* (a), in which an attorney having been discharged on payment of money, for which an attachment had been issued against him, was taken in execution at the door of the Court as he was going away; the Court there held, that, as he had been in legal custody he was not entitled to any privilege *redeundo*. Here, the party was in legal custody, and, therefore, was entitled to no privilege *redeundo*. Besides, the regular time for the defendant to be discharged was at the end of the Sessions. If, then, the defendant here had not been discharged until then, as *Newgate* was the Sheriff's prison, in which he

A defendant, when discharged from legal custody, has no privilege from arrest in returning home.

(a) 1 Tidd, 196, 9th ed.

1832.

ANONIMOUS

would remain, the plaintiff might lodge a detainer against him with the Sheriff, and he would take notice of it. Surely, then, although the party had been here discharged before the regular time, there could be no objection to his being arrested for the debt, since he might, if not so discharged, have been detained for it.

Campbell, contra, contended, that as the defendant would, if a witness, be entitled to privilege from arrest on his way home, he would be privileged here also on his way home after his discharge from custody.

PARKE, J.—Have you any case to shew that a defendant is entitled to privilege from arrest, in returning from legal custody; the privilege of the witness is for the benefit of others.

Campbell.—I have no case to that extent. But, since the defendant was at the Court on compulsory process, and as he is privileged from arrest on his return from attending as a witness on civil process, *a multo fortiori* must he be so in a criminal case. Besides, if this mode of proceeding were permitted, the process of the Court might be abused, merely for the purposes of malignity. A plaintiff might first proceed criminally, and then, when he found himself disappointed in that form, he might proceed civilly.

Cur. adv. vult.

Jan. 31st.

On the last day of term, in the presence of Lord Tenterden, C. J., Taunton, J., and Patteson, J.—

PARKE, J., said, that he had consulted the other Judges, and examined the authorities, and they were of opinion that no such privilege from arrest, when a defendant had been discharged from lawful custody, existed.

Rule discharged.

1832.

ANONYMOUS.

Jan. 21st.

ARCHBOLD opposed bail, on the ground that the affidavit of sufficiency required by Rule 3 of *Reg. Gen. T. T.*, 1 *W.* 4, stated only that the bail had a certain sum in the funds, without stating in what fund the money was.

It is not enough, in the affidavit of sufficiency, according to the rules of *T. T.*, 1 *Will.* 4, that the bail should describe himself as possessed of "money in the funds," without stating in what fund it is.

PARKE, J.—The object of this rule is, to give the plaintiff an opportunity of inquiring into the sufficiency of the bail. This statement is not sufficient, and, therefore, you may take time to inquire further.

ANONYMOUS.

Jan. 21st.

STEER opposed bail, on the ground that though the bail had two places of residence during the whole of the last six months, only one of them was given in the notice. This, he submitted, was a breach of Rule 2 of *Reg. Gen. T. T.*, 1 *W.* 4, which required, that the notice should "mention the street or place" "where each of the bail resides, and all the streets or places" "in which each of them has been resident at any time within the last six months."

If a bail has two places of residence, it is only necessary under *Reg. Gen. T. T.*, 1 *Will.* 4, to give one of them in the notice.

PARKE, J.—No, the object of the rule was to trace the party for six months in one residence. It was not intended to reach cases of this sort. I will, however, give you time if you require it. It is not a bad notice.

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Jan. 21st.

ANONYMOUS.

Keeping a gambling-house, is not a ground for rejecting bail; and, if allowed, is not a ground for refusing the defendant the costs of justification under Rule 3, *Reg. Gen.*, T. T., 1 *Will.* 4.

JUSTICE opposed bail, who swore to sufficient property, but who, it was shewn by affidavits uncontradicted by them, were gambling-house keepers, on the ground that the infamy of their characters, and their liability to penalties, rendered them unfit to become bail.

PATTESON, J.—That is no objection, if they swear to sufficient property.

Comyn, on the part of the defendant, applied for the costs of justification, under Rule 3 of *Reg. Gen.*, T. T., 1 *W.* 4.

Justice opposed the application, on the ground, that as the granting of the costs was discretionary with the Court, this was a case in which that discretionary power ought to be exerted to deprive the defendant of his costs.

PATTESON, J.—No, these two persons have sworn to sufficient property, and are allowed. There is, therefore, no ground for depriving the defendant of the costs of justification.

Jan. 21st.

ANONYMOUS.

By the rules of *Trinity Term*, 1 *Will.* 4, it is only necessary in the notice of bail to state the residence of the bail for the last six months, without going on to state that the bail has resided there for that period; but it must state the bail to be a housekeeper or a freeholder, although accompanied by the affidavit under Rule 3, *Trinity Term*, 1 *Will.* 4.

BALL opposed bail on the ground that the notice of bail did not, besides stating the residence of the bail, go on to state, that he had resided there during the last six months, as required by *Reg. Gen.*, T. T., 1 *Will.* 4, r. 2.

TAUNTON, J.—There is nothing in the objection. The residence of which he is there described must be taken as his residence for the last six months, without going on to say, that he has resided there during that period. There was a difference in the practice of the Judges on the subject, but it is now agreed, that such must be taken as the construction to be put on these words.

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ANONYMOUS.

Ball then objected, that the notice did not state the bail to be a housekeeper or a freeholder. *Reg. Gen. T. T.*, 1 *Will. 4*, r. 2.

Platt, in support of the bail, submitted that as the notice of bail was here accompanied with an affidavit, in which the bail swore that he was a housekeeper, it was not necessary to state the fact in the notice.

TAUNTON, J.—I am of opinion, that it should be stated in the notice also. It is important, that these rules should be strictly attended to.

Bail rejected (a).

(a) A similar opinion was delivered by *Vaughan, B.*, in the *Eschequer*, in the course of the same term. See *Reg. Gen. T. T.* 1 *Will. 4*, r. 2, *ante*, p. 103.

1832.

WEST v. WILLIAMS.

(Before the four Judges.)

Jan. 23rd.

If bail justify by affidavit, in pursuance of the new rules of Trinity Term, 1 Will. 4, the notice must be accompanied either by the original affidavit, or by a copy purporting upon the face of it to be a copy.

IN this case, bail had justified by affidavit according to the new rules; and the bail having been excepted to, the costs of the justification had been allowed as of course. The notice of bail was accompanied by a writing, which purported to be made by both the bail, but which, on examination, was evidently not the original affidavit, nor was it headed "copy," nor was any thing stated on the face of it to shew that it was a copy. Under these circumstances, an application was made to Mr. Justice *Patteson* to disallow the costs of the justification. Upon inquiring for the original affidavit, none was produced, and the learned Judge disallowed the costs.

White, on a former day, moved to rescind that order, contending that it sufficiently appeared that it was only a copy, and that a copy was sufficient.

Lord *TENTERDEN* postponed granting the rule, until he had consulted all the Judges, as it was a question of general importance; and now his Lordship said, that the other Judges coincided with him in opinion that no rule should be granted. They thought it should either have been headed "copy," or there should have been some reference in it to the original; and that information about the real affidavit ought to have been given.

Rule refused.

1832.

DOE *d.* ——— *v.* SLIGHT.

Jan. 24th.

MANNING applied for a rule to inspect a certain lease in the hands of the defendant, a lessee, in which the lessor of the plaintiff was lessor. He produced an affidavit, which stated that search had been made for the counterpart of the lease, but that it could not be found; and that, to the best of the deponent's belief, none had ever been executed. He cited *Blakey v. Porter* (a), *King v. King* (b), *Pickering v. Noyes* (c).

Where a lease is in the hands of a tenant, and it appears that no counterpart can be found, the Court will permit the landlord to inspect and take a copy of the lease.

Cur. adv. vult.

PATTESON, J.—I have consulted the other Judges, and they think that this case comes within the general rule, that the tenant is a trustee of the lease for both the landlord and himself, and that the landlord has a right, for any purpose for which he may require it, to come to this Court and have a rule for the inspection of the lease, and for taking a copy at his own expense. But we cannot compel him to produce it at the trial. The plaintiff will give him notice to produce it.

Rule absolute, in the first instance.

(a) 1 Taunt. 386. (b) 4 Taunt. 666. (c) 2 Dowl. & Ry. 386.

REX *v.* The Justices of SUFFOLK.

Jan. 24th.

AN appeal was heard at the *Easter* General Quarter Sessions, holden in the year 1830, by adjournment, at

Where the Quarter Sessions have confirmed an order of removal, subject

to a case for the opinion of the Court of *King's Bench*, and the Justices cannot agree for several Sessions on the terms of the case, this Court will grant a *mandamus*, commanding them to enter continuances and hear the appeal; for the order of Sessions being only conditional, there is no decision unless the case is returned.

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Bury St. Edmunds, for the county of *Suffolk*, in which the parish officers of *Whepstead* were appellants, and the churchwardens and overseers of the parish of *Lanshall* respondents, against an order of removal. The order was confirmed, subject to a case to be stated for the opinion of the Court of *King's Bench*. The junior counsel for the appellants drew up the case, and submitted it to the junior counsel for the respondents, who returned it, with various alterations, about the 12th *June*, 1830, at which time a *certiorari* was obtained for returning both orders. The counsel, however, not agreeing, an application was made by the appellants to the Justices at their next Quarter Sessions at *Bury St. Edmunds*, to settle the case. The Court referred them to the Chairman of the Sessions at which the case was granted. Reference was had to him. He was attended by counsel on both sides, but did not settle the case. At the *July* Sessions, the appellants renewed their application to the Court; but they, being of opinion that they had no jurisdiction, refused to interfere. No notice of their intended applications had been given by the appellants to the respondents. The 10th rule of the Sessions required, that "whenever the Court should think fit to reserve a point of law for the opinion of the Court of *King's Bench*, the case should be settled and signed by one counsel on each side, subject to the approval and revision of the Court, to be made known by the Chairman's signature; but if the counsel could not agree on the case, the same might be drawn up by the Clerk of the Peace, subject to such approval and revision." Application was accordingly made to the Clerk of the Peace, to draw up the case; but he refused, on the ground that he could only draw it up subject to the revision of the Court which had granted the case.

A rule to shew cause having been obtained by *Austin*, on the part of the appellants, why a *mandamus* should not issue, to be directed to the Justices, commanding them

to enter continuances and hear the appeal, unless they could agree on a case for the opinion of the Court—

1832.

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B. Andrews, and *Gunning*, now shewed cause.—After the lapse of time between the granting of the case and this application, there being no default shewn on the part of the respondents in using efforts to procure the drawing of the case, the Court would not now interfere. But the Court could not, if willing. The case should have been drawn at the Quarter Sessions at which the appeal was heard. In *Nolan's Poor Laws*, c. 2, p. 558, 4th ed., it was laid down, that “no other Sessions has power to grant a case, but that before which the appeal is decided and judgment given;” and a manuscript case in the note is cited as an authority. There, an application was made for a case, but not granted; and an unconditional order for quashing the order of removal was entered, and remained on the records of the Sessions. At the following Session, on application made, a case was granted. A *certiorari* was lodged at the next Sessions for removing the orders. The Court afterwards quashed the *certiorari*, on the ground that a subsequent Session has no power “to control or qualify the absolute order made at the *Easter* Sessions previously, for quashing the order of removal.”

PARKE, J.—But here, no absolute order of removal was made. The Sessions have restricted it, subject to the opinion of the Court of *King's Bench*.

B. Andrews.—But the orders cannot be removed into this Court now; for the *certiorari*, by 13 *Geo. 3*, c. 18, s. 5, must be applied for within six months after the order has been made, and not after settling the case. In *Rex v. Justices of Sussex (a)*, Lord *Ellenborough* said—“The

(a) 1 M. & S. 734.

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statute expressly requires that the *certiorari* shall be applied for within six months after order made; and I think it will be attended with beneficial consequences if we put a strict interpretation on this clause, as it will have a tendency to accelerate the settlement of cases which are intended to be brought up for our revision." Mr. Justice Bayley also observed, that, "in strictness, the case ought to have been settled at the *Michaelmas* Sessions, *sedente curia*." Besides, if the Court were to interfere, it would be in breach of the 10th rule of the Sessions, which is in accordance with the law, as declared in *Rex v. Justices of Sussex*, and which requires that the case should be settled at the Sessions where the appeal is heard. The rule for a *mandamus* must therefore be discharged.

Austin, contrà.—As to the delay remarked by the other side, in making the present application, every possible effort was made to get this case settled; and, therefore, the appellants were not to blame. Similar applications have been granted in other cases by the Court. In the case of *Rex v. Justices of Westmoreland (a)*, it was decided, that, if the magistrates present are equally divided, the Sessions cannot make any order, but ought to enter continuances until the next Session, in order that the Court may again proceed on the appeal; and there, the Court of *King's Bench* was disposed to grant a peremptory *mandamus* to proceed with the appeal, unless the Sessions had complied. In *Bodmin v. Warligen (b)*, on an appeal against an order of removal, there being only two Justices, and they divided in opinion, no order was made, but an entry was made by the Clerk of the Peace, that the appeal was lodged, and nothing done in it. One of the parishes gave fresh notice of appeal to the next Sessions, when the Justices proceeded in it, and quashed the order. *Per Curiam*—The diffi-

(a) 2 Bott, P. L. 733, 5th ed.

(b) *Ibid*.

culty arises from the penning of the entry by the Clerk of the Peace. If they were divided equally in opinion, that was a sufficient warrant for the Clerk of the Peace to have entered an adjournment, and it was his duty so to have done." Again, in *Rex v. Justices of Sussex* (a), the Court of Quarter Sessions conceived a doubt on an appeal, and ordered a special case to be made, for the opinion of the Court of *King's Bench*. The counsel withdrew, in order to settle the case; but before they could come to any agreement, the Sessions were inadvertently adjourned, and the cause was neither retained nor ended. Upon these facts, an application was made to the Court of *King's Bench* for a *mandamus* to compel the Justices to proceed in the appeal. *By the Court*.—"When the Justices entertain a doubt, they may, without the consent of the parties, order a special case to be made. When the Justices say, as they did here, that a special case shall be made, they virtually say that the cause shall be adjourned over till the case is made, and therefore the want of an adjournment or a respite is merely the omission of the clerk, and may at any time be supplied. Let a *mandamus* go immediately, unless the respondents will consent to a case." He also cited a manuscript note of a case which occurred in *Easter Term*, 1831, before the four Judges. In that case, *Campbell* obtained a rule *nisi* why a *mandamus* should not issue, directed to certain Justices, commanding them to state a case for the opinion of the Court of *King's Bench*. A *certiorari* had been issued to remove the order. The order of magistrates, and the order of Sessions confirming the order of magistrates, subject to a case, had been returned. *John Evans* shewed cause. *Parke, J.*—"In contemplation of law, the case is stated by the Justices at Sessions. In fact, the Justices at Sessions have not determined the ap-

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(a) 2 Bott, P. L. 751, 5th ed.

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peal. It is quite clear that they have not decided the appeal, for a decision of that conditional nature is no decision at all. Lord *Tenterden*, C. J.—The return to us is, that they have confirmed the order, subject to a case. Let them enter continuances, and hear the appeal. We cannot order them to state a case; but, as they have confirmed the order subject to a case, that is no confirmation at all, unless they return the case. I do not say whose business it is to draw a case. All that we order them to do is to hear and determine. *Parke*, J.—The effect of their order is just the same as if they had refused to hear the appeal at all. Lord *Tenterden*, C. J.—Let the rule be to enter continuances, and hear the appeal." This is a case directly in point. Another case had been recently determined, in which the circumstances were precisely the same, and the result was, that the Court made absolute a rule for a *mandamus* to enter continuances and hear the appeal.

PARKE, J.—The only doubt in my mind, at the present moment, is, whether the appellants have satisfactorily excused themselves from the charge of delay. Since the question is of some importance, I will take an opportunity of speaking to the other Judges of the *King's Bench*, as it may become a rule in similar cases for the future. If there has been no improper delay, I think a *mandamus* ought to go to the Justices to enter continuances to hear the appeal, for they have not absolutely decided it. They have only decided it subject to a case for the opinion of this Court. We cannot order them to state a case.

Cur. adv. vult.

Jan. 26th. PARKE, J.—I have taken an opportunity of speaking to the other Judges. They think with me, that the delay has not been so great as to preclude the appellants from

having the rule for a *mandamus* to enter continuances and hear the appeal made absolute. The *mandamus* will therefore go, unless a case be settled in the mean time. We cannot command them to settle a case.

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Rule absolute.

BARKER v. DYNES and Others.

Jan. 24th.

KELLY moved on behalf of the Sheriff of *Suffolk*, under 1 & 2 Will. 4, c. 58, s. 6 (a), for time to return the writ, on an affidavit, stating, that, on *January* 5th, he seized goods by virtue of a *fi. fa.*, and that he found two persons in possession, one claiming a large portion of them under a bill of sale, dated *December* 2nd, to *Fisher* and another, and the other claiming to be entitled to all the defendants' goods under an assignment, dated *January* 4th, of all the defendants' goods and property, to *John Bush*, in trust for himself and all the creditors of the defendant.

The Sheriff is not entitled to his costs on application under the 1 & 2 Will. 4, c. 58, s. 6; and his claim to poundage depends on the legality of the seizure.

S. Hughes, for *Bush*.

Platt, for the execution creditor.

Austin, for *Fisher*, submitted, that this was not a case to which the act applied. The language of sect. 6, is, "when any such claim shall be made." Here no claim is made, but the parties for whom I appear are already in possession of the goods in question. They do not make claim to these goods, but possess them. The property was changed by the seizure under the bill of sale. It is not, therefore, a case contemplated by the statute.

PARKE, J.—It is a case in which the statute does ap-

(a) See 2 Dowl. Stat. 571.

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BARKER

v.
DYER.

ply, because you claim a part of the goods taken in execution.

Kelly, for the Sheriff.—That the Sheriff is not entitled to his costs, has been already decided. But, if it should appear that this seizure was good, he will be entitled to his poundage.

PARKE, J.—The Sheriff is not entitled to his costs, as the statute is passed for his relief. He must here pay the proceeds of the seizure into Court, suspending his claim to poundage. His right to receive it must depend on the event of the suit.

Rule enlarged, the parties agreeing on the mode in which their respective claims should be tried.

Jan. 25th.

HOVENDEN v. CRAWTHER.

If a defendant consents that a plaintiff shall have judgment as of a term previous to the trial, in proceeding against the bail the *ca. sa.* may be tested as of that previous term.

CHANNELL shewed cause against a rule calling on the plaintiff to shew cause why all proceedings against the bail on their recognizance should not be set aside; the plaintiff had proceeded to trial last *Michaelmas* Term; and, under an order of Lord *Tenterden*, made by consent of the defendant, and made a rule of this Court, the plaintiff obtained judgment of that term. He then proceeded against the bail, and tested the *ca. sa.* against the defendant as of *Michaelmas* Term. The objection on the part of the bail was, that the *ca. sa.* was so tested. No such objection could be sustained. Judgment in this case had not been obtained under the 1 *Will.* 4, c. 7, s. 2 (a), but by consent of the defendant. The judgment must,

(a) See 2 Dowl. Stat. 15.

therefore, be treated as if the trial had taken place in *Michaelmas* Term. It would have been otherwise had the judgment been obtained under the statute. As the judgment would be entered as of *Michaelmas* Term, and the *ca. sa.* was tested of that term, no error would appear on the record. Nothing was said by Mr. *Tidd* in his *Practice* which shewed in any way that this was an irregularity.

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HOVENKAMP
v.
CRAWFORD.

PARKE, J.—All would appear regular on the record.

Comyn, in support of the rule.—The practice of the Court has always been, not to permit a plaintiff to vary from the ordinary course of proceeding, for the purpose of fixing bail. I do not object to the proceeding as against the defendant. The plaintiff had a right to obtain his judgment and issue execution as of *Michaelmas* Term, against the defendant, although that would be contrary to the usual course of practice, for, ordinarily, the plaintiff would not be entitled to obtain his judgment until the fifth day of the present term. The defendant, if he chooses, may consent to the plaintiff having it sooner as against himself, but he has no right to do so as against the bail, for that would have the effect of expediting the proceedings against the bail. I have been able to find no case which shews this to be an irregularity; but, upon principle, I submit, that proceedings against the bail cannot be expedited by consent of the defendant.

PARKE, J.—It appears to me that the proceedings against the bail here are not irregular. The effect of the defendant's consent is, that the plaintiff shall be allowed to enter up judgment as of *Michaelmas* Term. In making up the record, it will appear to have been obtained of that term, and the *ca. sa.* corresponds with the judgment.

1832.

HOVENDEN
v.
CRAWTHOR.

And no one can aver against the record. It is in fact the same as if the trial had taken place in *Michaelmas* Term.

Rule discharged.

Jan. 27th.

JACKSON'S Bail.

Where the property, of which the bail describes himself possessed in his affidavit, according to the third rule of T. T. 1 W. 4, is insufficient, the Court will not allow him to justify, without payment by the defendant of the costs of opposition, although possessed of sufficient other property.

ARCHBOLD opposed bail, on the ground that the property, of which he had described himself as possessed in the affidavit, required by rule 3 of *Trinity* Term, 1 *Will.* 4, was insufficient, although, on examining him, it appeared that he possessed sufficient other property to enable him to justify.

Watson, in support of the bail, submitted that the question for the consideration of the Court was, whether the bail was possessed of sufficient property to enable him to justify. It was clear he was, and therefore he ought to pass.

PARKE, J.—But if I do that, I shall place the plaintiff in this situation:—By rule 3 of *Trinity* Term last, if the plaintiff opposes bail, and they pass, the defendant is entitled to the costs of justification, unless the Court shall otherwise order. Although, therefore, the defendant has not given the requisite description, according to the same rule, and the opposition, therefore, is in strictness successful, the plaintiff will be liable to costs. If I allow the bail to pass, the defendant must pay the costs of the opposition.

1832.

ANONYMOUS.

Jan. 27th.

HUTCHINSON moved for a rule to shew cause, why a judgment, signed in this case, should not be set aside with costs. The plaintiff and defendant both resided at *Torquay* in *Devonshire*, but the plaintiff's attorney resided in *London*. The action was brought against the defendant, as acceptor of a bill of exchange for 21*l.* 14*s.* A *cognovit* was agreed to be taken, and, in order to save stamp duty, the defendant paid the costs and 2*l.*, and gave a *cognovit* for the difference, which he sent to the plaintiff's attorney in *London*. By the terms of the *cognovit*, judgment was to be entered on the 11th of *January*, if payment was not made on that day. The defendant, on that day, tendered to the plaintiff in *Devonshire* the entire sum due, which the latter refused to accept, conceiving it should be paid to his attorney. On the 12th, the plaintiff's attorney wrote to the defendant from *London*, desiring him to remit the amount. On the 13th the attorney received a letter from the defendant, stating the tender, but, having written to the defendant the night before, he considered it unnecessary to answer this letter. Having waited until the 17th without receiving an answer to his letter, he signed judgment on that day. This judgment was irregular, because the tender was made to the plaintiff on the day when the *cognovit* required payment to be made.

Where a *cognovit* is given for the payment of a sum generally, the defendant may pay either the plaintiff or his attorney.

Martin shewed cause in the first instance, and submitted that the *cognovit* having been remitted to the plaintiff's attorney by the defendant, the money should have been remitted to him also; and although the tender to the plaintiff might have been a legal tender, yet its effect was defeated by the subsequent demand contained in the letter of the 12th.

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ANONYMOUS.

PARKE, J.—The question is, whether the tender to the plaintiff is a good tender; for, if it was, the plaintiff's attorney had no right to call upon the defendant to incur the expense of remitting the money to *London*. By the terms of the *cognovit*, he had a right to pay the money either to the plaintiff or his attorney; and having tendered the money to the plaintiff on the day when it became due, he was not bound to remit it to town. The judgment was, therefore, irregular, and must be set aside, with costs.

Rule absolute, with costs.

Jan. 27th.

Re —

A conviction of conspiracy is not of itself a sufficient ground for striking an attorney off the roll.

CAMPBELL shewed cause against a rule for striking an attorney off the roll, on the ground of his having been convicted of conspiracy more than two years ago. He produced various affidavits, shewing that the circumstances which had given rise to the prosecution by no means fairly warranted the proceeding, and that the prosecutor of the indictment, as well as the relator of the present application, were actuated by malicious motives. Although the Court, in some cases of conspiracy, had thought it right to proceed as severely against an attorney as required by the present application, it was only where very gross misconduct on his part was evident.

Adolphus appeared in support of the rule.

PARKE, J.—There are no cases, in which there is more variety than in cases of conspiracy. They vary from the highest degree of enormity to the lowest degree of culpability. There is no case which goes the length of deciding, that the mere fact of having been convicted of a

conspiracy is a sufficient ground for striking an attorney off the roll. It does not appear that there was any thing aggravated in the circumstances, and, therefore, the rule must be discharged. Since the nature of these circumstances must clearly have been known to the person who made the present application, it must be discharged with costs.

Rule discharged, with costs.

1832.
Re —

JAMESON v. SCHONSWAR and Another.

Jan. 27th.

MAULE shewed cause against a rule obtained by *V. Richards*, for quashing the *habeas corpus*, removing the defendant out of the custody of the Serjeant at Mace of the Lord Mayor's Court of the City of London, into the custody of the Marshal; for remanding him into the custody of the Serjeant at Mace; and for a *procedendo*. The affidavit on which the rule has been obtained is not properly intitled. It is intitled in the cause in the Lord Mayor's Court. There is no such cause depending in this Court. Although the writ is called a "*habeas corpus cum causa*," and a return has been made to it, that does not remove the cause itself. The words "*cum causa*" merely mean "with the cause of the party's detention in custody." The return might be "that the party had been guilty of a contempt" or "was a lunatic." It is different from the case of a *certiorari*, which removes the cause itself. The affidavit should have been intitled "In the *King's Bench*" only.

Where a plaint has been entered in the Lord Mayor's Court against two defendants, and one only has been arrested, the cause cannot be removed into the *King's Bench* without bail being put in for both defendants.

Semble—that the affidavits in support of the rule for a *procedendo* in such a case should not be intitled in the cause in the inferior Court, but "In the *King's Bench*" only.

PARKE, J.—If it ought to be so intitled, I should permit it to be amended.

Maule.—The facts, as they appear on the affidavit on

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 v.
 SCHONSWAR.

which the rule is drawn up, are these:—The action was commenced for 2,000*l.* and the defendant, *Schonswar*, was arrested on the 21st of *January* by virtue of a precept issued out of the Lord Mayor's Court to the Serjeant at Mace. On the same day a *habeas corpus* was obtained, returnable on the following *Saturday* before a Judge at Chambers, and the defendant was committed to the custody of the Marshal. The affidavit then states that it is the custom of *London*, where two defendants are sued in the Lord Mayor's Court, and one only is arrested, that the defendant arrested must put in bail for himself and his co-defendant before he can obtain his own discharge, and that this custom is certified by the Recorder. The defendant *Schonswar* has given notice of bail, who have justified, conditionally, to abide the decision of the Court. On the present rule, the other side is driven to contend, that where one of two defendants is arrested and thrown into prison, he cannot obtain his liberty, unless he put in bail for the other as well as for himself.

PARKE, J.—No, they need not contend to that extent. They say, you cannot remove a cause by *habeas corpus* into the Court above, and thereby suspend their proceedings, unless you remove the whole cause. Now, how do you get the other defendant into this Court? In the case of *Keat and Another v. Goldstein and Castles* (a), Mr. Justice *Bayley* says, "Suppose the case of two persons being served with process out of an inferior Court, one of them sues out a writ of *certiorari*, and appears in the Court above for himself alone—the case is certainly not well removed, and that is in fact the very case before us. There is no hardship in this. The cause was commenced in the Court below, and the attempt to remove it fails, because both the defendants are not before the

(a) 7 B. & C. 525.

Court." How can you distinguish that case from the present?

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Maule.—There, the proceeding was by *certiorari*, which removes the cause; but a *habeas corpus* only suspends the proceedings of the inferior Court. Besides, in that case, the goods of the defendant had been attached. The plaintiff had actually got the security of the defendant's goods, and, therefore, this Court would not allow him to be deprived of one security without giving him another.

PARKE, J.—What do you say to the case in *Strange* (a)?

Maule.—That case has no reference to the custom. There, both the defendants were in actual or constructive custody.

PARKE, J.—I take it to be irregular to stay these proceedings, unless both defendants are in the Court above. You ought not to suspend the proceedings of the plaintiff in the Court below, without putting him in a similar situation in the Court above.

Maule.—Where a defendant is removed by *habeas*, the plaintiff proceeds *de novo*; though it is usual to declare at once, there is no reason why the plaintiff may not sue out an original against both defendants. He may then proceed to the outlawry of the defendant who does not appear, and declare against the defendant who has appeared, in the same manner as against any other person in the custody of the Marshal.

PARKE, J.—But when he has in fact appeared by bail, or is in the custody of the Marshal, can you sue out an

(a) *Fry v. Carey*, 1 *Strange*, 527.

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original to make him appear again? My judgment is not founded on the custom stated to exist in the Mayor's Court. If the only defendant arrested tendered bail, they must bail him (a). Such a custom is clearly bad. But have you any authority for saying, that where bail has been put in on a *habeas corpus*, upon a plaint in an inferior jurisdiction, you may afterwards sue out an original writ against him?

Maule.—I am not aware of any case on the point. But, on principle, I apprehend he might do so.

PARKE, J.—Then, when is the bail to the original writ considered as put in? The bail on the *habeas corpus* cannot be bail to it. We cannot connect the recognizance of his bail with the process by original.

Maule.—He stands in the same situation as any other person in lawful custody, against whom proceedings by original are commenced. There is nothing to shew that he has appeared in the action commenced by original. It is not known what the cause of action is. Therefore, there can be no difficulty on that point. As to the recognizance of the bail, the sense of it is, that they will be bound to answer all actions which may be brought in respect of a particular cause of action. Suppose an action brought for the price of a horse. The recognizance of the bail is, that they will be liable in any action brought for the horse. But, suppose one defendant were abroad and one in custody, the only course for the plaintiff to pursue would be to sue out an original. Suppose the case of an action in the *Common Pleas*, where all proceedings are by original, or *quasi* by original—it would not be said that there, if a defendant had been removed by *habeas*

(a) See 1 M. & P. 216.

corpus, the plaintiff could not proceed against him in the ordinary way. By proceeding by original, the plaintiff would gain an advantage beyond what he would possess in the inferior Court. There, he could not proceed to outlawry against the defendant not in custody; but here he could. For these reasons, I submit that the defendant *Schonswar* was properly removed out of the custody of the Serjeant at Mace, and is entitled to be discharged out of the custody of the Marshal on putting in bail for himself alone.

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R. F. Richards supported the rule.

Cur. adv. vult.

PARKE, J.—I have consulted the other Judges, and also Mr. Baron *Bayley*, and they are all of opinion that the cause is not regularly removed.

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Rule absolute.

ANOTHER case, in which a person named *Prior* was plaintiff, against the same defendant, under the same circumstances, was determined by this decision.

Maule, in this latter case, shewed cause; and—

Channell supported the rule.

HEMMING v. BLAKE.

Jan. 28th.

ONE of two bail was opposed and rejected, on the ground that he had not a vested interest in the property described in his affidavit of justification, sworn according to pass on justifying for other property, the plaintiff is entitled to the costs of the opposition.

When bail cannot justify in respect of the property described in the affidavit of justification, but are allowed

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 }
 HEMMING
 v.
 BLAKE.

to the late rules of *Trinity Term*, 1 *Will.* 4, but was allowed to justify for other property not mentioned in his affidavit.

Archbold now applied for the costs of opposing such bail, under Rule 3, *Reg. Gen. T. T.* 1 *Will.* 4.

PARKE, J.—The defendant having misled the plaintiff by his affidavit, and thereby caused him to incur the expense of the opposition, in which he has succeeded as far as regards the only property mentioned in his affidavit, the plaintiff is entitled to his costs of opposition; and we only allow the bail to justify for other property on the terms of his paying the costs of the opposition.

Jan. 31st.

A defendant cannot object to the taxation of a plaintiff's bill of costs, on the ground of costs being allowed for a period of the cause during which it was conducted by a person not an attorney, or being an uncertificated attorney.

— v. SEXTON.

LANGSLOW applied for a rule to shew cause why the Master should not review his taxation. He moved on the part of the defendant in the action, on the ground that the Master had allowed costs which the defendant was not bound to pay. The action was commenced in *November*, 1830, by a person who was not an attorney. In the month of *May*, 1831, the case was put into the hands of a person who was an attorney, but had not taken out his certificate. He conducted it till *August*, 1831, and then a certificated attorney undertook it. This was the day before the trial. A verdict was found for the plaintiff, and the costs taxed. The Master allowed all the costs from the commencement of the cause down to the time of taxation. But he submitted that the Master ought not to have allowed any other costs than those incurred during the time the cause was under the management of a certificated attorney. The plaintiff would not be liable to pay costs to either of the persons previously engaged. His motion therefore was,

that the Master might review his taxation, for the purpose of disallowing those costs previously incurred.

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v.
SEXTON.

PARKE, J.—It is not in the power of the defendant to raise the question. That lies between the plaintiff and the person engaged by him as an attorney. That has been decided in the case of *Reader v. Bloom* (a), and which has since been recognised by this Court.

Rule refused.

(a) 10 B. Moore, 261; 3 Bing. 9, S. C.

JONES v. TYE.

Jan. 31st.

V. RICHARDS shewed cause against a rule for setting aside a writ of *fi. fa.*, and for paying over the amount levied under it to the defendant. The defendant had been arrested on mesne process. Judgment was subsequently obtained, and a *fi. fa.* issued, and a levy made. The objection to the proceeding was, that the defendant being in custody, the plaintiff had no right to issue execution against his goods. But the plaintiff had clearly a right to waive his proceedings against the person, and issue execution against the goods. If the defendant had applied to the plaintiff, he would have had an order for his discharge.

If judgment is obtained against a defendant in custody on mesne process, the plaintiff in the action may issue execution against the goods without discharging him.

Platt, in support of the rule.—I have not been able to find any case exactly like this; but I submit that the plaintiff ought to have discharged the defendant out of custody, before he proceeded against his goods, he having made his election to proceed against the body originally.

PARKE, J.—That proposition cannot be maintained.

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JONES
v.
TYE.

The plaintiff has a right to take any execution he thinks proper. The plaintiff did not refuse to discharge him.

Rule discharged, with costs.

Jan. 31st.

Ex parte SCHWALBANKER.

Where bills have been deposited with an attorney, and he has advanced money on them, and he refuses to account, the Court will not compel him summarily to pay over the alleged balance.

B. ANDREWS moved for a rule to shew cause why an attorney of the Court should not pay over 15*l.* belonging to a Mr. *Schwalbanker*, his client. Mr. *S.* had applied to the attorney to raise him money by discounting bills. He declined doing so, but offered to advance him some money on the security of bills. Mr. *S.* accordingly deposited bills to the amount of 25*l.* in his hands. He advanced 10*l.* and now refused to account for the residue. He cited *In the matter of Knight* (a), *De Woolfe and Others v. ———* (b), *In the matter of Atkins* (c).

PATTESON, J.—I do not think this is such a case as the Court is in the habit of considering fit for its summary interference. The Court has only interfered in cases where the attorney has been employed in certain matters, because he was an attorney, as where he was employed by executors to collect debts.

Rule refused.

(a) 1 Bing. 91; 7 B. Moore, 437, S. C.

(c) 4 B. & A. 47.

(b) 2 Chit. Rep. 68.

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ANONYMOUS.

ADDISON opposed bail on the ground of his being acceptor of the bill of exchange on which the action was brought against the drawer.

The acceptor of a dishonoured bill of exchange is not competent to become bail in an action against the drawer.

The affidavit of sufficiency stated the bail to be possessed of property to much greater amount than that for which he was required to become bail, after the payment of all his debts.

TAUNTON, J.—There cannot be a stronger proof of insolvency, short of an act of bankruptcy, than an acceptor in trade not meeting his acceptance. He ought to pay his own debts first.

Bail rejected.

REGULÆ GENERALES.

I.

WHEREAS it is expedient that the practice of the Courts of *King's Bench*, *Common Pleas*, and *Exchequer of Pleas*, should, as far as possible, be rendered uniform:

IT IS ORDERED, That the practice to be observed in the said Courts, with respect to the matters hereinafter mentioned, shall be as follows; that is to say—

AUTHORITY TO PROSECUTE OR DEFEND.

1. Warrants of attorney to prosecute or defend shall not be entered on distinct rolls, but on the top of the issue roll.

Appointments to sue and defend.

2. A special admission of *prochein amy*, or guardian, to prosecute or defend for an infant, shall not be deemed an authority to prosecute or defend in any but the particular action or actions specified.

Admission of *prochein amy* or guardian.

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AFFIDAVIT.

Affidavit of service of process.

3. No affidavit of the service of process shall be deemed sufficient if made before the plaintiff's own attorney, or his clerk.

Affidavit not intitled, when received.

4. An affidavit sworn before a Judge of any of the Courts of *King's Bench*, *Common Pleas*, or *Exchequer*, shall be received in the Court to which such Judge belongs, though not intitled of that Court; but not in any other Court, unless intitled of the Court in which it is to be used.

Addition in affidavit.

5. The addition of every person making an affidavit shall be inserted therein.

Affidavits, before whom sworn.

6. Where an agent in town or an attorney in the country is the attorney on the record, an affidavit sworn before the attorney in the country shall not be received; and an affidavit sworn before an attorney's clerk shall not be received in cases where it would not be receivable if sworn before the attorney himself; but this rule shall not extend to affidavits to hold to bail.

ARREST.

Second arrest.

7. After *non pros.*, nonsuit, or discontinuance, the defendant shall not be arrested a second time without the order of a Judge.

Affidavits for work and labour, and money paid.

8. Affidavits to hold to bail for money paid to the use of the defendant, or for work and labour done, shall not be deemed sufficient unless they state the money to have been paid, or the work and labour to have been done, at the request of the defendant.

No supplemental affidavits.

9. No supplemental affidavit shall be allowed to supply any deficiency in the affidavit to hold to bail.

Variance between *ac etiam* and declaration, or want of *ac etiam*, not to relieve bail or discharge the defendant, but bail to stand for 40%.

10. A variance between the *ac etiam* and the declaration, or the want of an *ac etiam*, where the defendant is arrested, shall not be deemed ground for discharging the defendant, or the bail; but the bail-bond or recognizance of bail shall be taken with a penalty or sum of 40% only.

1832.

WRIT, WHEN AND HOW TO BE FILED.

11. When the rule to return a writ expires in vacation, the Sheriff shall file the writ at the expiration of the rule, or as soon after as the office shall be open.

Sheriff, when ruled, to return writ in vacation.

12. And the officer with whom it is filed shall indorse the day and hour when it was filed.

Officer to indorse hour when filed.

BAIL.

13. If any person put in as bail to the action, except for the purpose of rendering only, be a practising attorney, or clerk to a practising attorney, the plaintiff may treat the bail as a nullity, and sue upon the bail bond as soon as the time for putting in bail has expired, unless good bail be duly put in in the meantime.

Attorney and clerk, when good bail.

14. In the case of country bail, the bail piece shall be transmitted and filed within eight days, unless the defendant reside more than forty miles from *London*, and, in that case, within fifteen days after the taking thereof.

Country bail piece, when transmitted.

15. When bail to the Sheriff become bail to the action, the plaintiff may except to them, though he has taken an assignment of the bail bond.

Exception to Sheriff's bail.

16. It shall be sufficient, in all cases, if notice of justification of bail be given two days before the time of justification.

Notice of justification.

17. If bail, either to the action or in error, are excepted to in vacation, and the notice of exception require them to justify before a Judge, the bail shall justify within four days from the time of such notice, otherwise on the first day of the ensuing term.

Bail excepted to in vacation to justify, when.

18. Notice of more bail than two shall be deemed irregular, unless by order of the Court or a Judge.

More than two bail, when regular.

19. Affidavits of justification shall be deemed insufficient, unless they state that each person justifying is worth

What affidavits of justification must state.

1832.

the amount required by the practice of the Courts, over and above what will pay his just debts, and over and above every other sum for which he is then bail.

Bail rejected
may render.

20. Bail, though rejected, shall be allowed to render the principal without entering into a fresh recognizance.

What bail liable
to.

21. Bail shall only be liable to the sum sworn to by the affidavit of debt, and the costs of suit; not exceeding in the whole the amount of their recognizance.

Render, when.

22. Bail shall be at liberty to render the principal at any time during the last day for rendering, so as they make such render before the prison doors are closed for the night.

Proceedings on
bail bond.

23. A plaintiff shall not be at liberty to proceed on the bail bond pending a rule to bring in the body of the defendant.

Proceedings on
bail bond.

24. No bail bond taken in *London* or *Middlesex* shall be put in suit until after the expiration of four days; nor, if taken elsewhere, till after the expiration of eight days exclusive from the appearance day of the process.

Twenty days to
except to bail on
habeas corpus.

25. The time allowed for excepting to bail put in upon a *habeas corpus* shall be twenty days.

Bail in error.

26. A recognizance of bail in error shall be taken in double the sum recovered, except in case of a penalty; and, in case of a penalty, in double the sum really due, and double the costs.

Bail in eject-
ment.

27. In ejectment, the recognizance of bail in error shall be taken in double the yearly value, and double the costs.

BAIL BOND AND ACTION THEREON.

Sheriff suing on
bail bond.

28. An action may be brought upon a bail bond by the Sheriff himself, in any Court.

Where bail bond
security.

29. In all cases where the bail bond shall be directed to stand as a security, the plaintiff shall be at liberty to sign judgment upon it.

Proceedings on

30. Proceedings on the bail bond may be stayed on

payment of costs in one action, unless sufficient reason be shewn for proceeding in more. bail bond stayed.

APPEARANCE.

31. A defendant who has been served with process by original shall enter an appearance within four days of the appearance day, if the action is brought in *London* or *Middlesex*, or within eight days of the appearance day in other cases, otherwise the plaintiff may enter an appearance for him according to the statute; and any attorney who undertakes to appear shall enter an appearance accordingly. Appearance to original.

IRREGULARITY IN PROCESS AND PROCEEDINGS.

32. Where the defendant is described in the process or affidavit to hold to bail by initials, or by a wrong name, or without a Christian name, the defendant shall not be discharged out of custody, or the bail bond delivered up to be cancelled, on motion for that purpose, if it shall appear to the Court that due diligence has been used to obtain knowledge of the proper name. Mistomer.

33. No application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity. Irregularity.

34. If a party plead several pleas, avowries, or cognizances, without a rule for that purpose, the opposite party shall be at liberty to sign judgment. Double pleading.

DECLARATION, AND TIME FOR.

35. A plaintiff shall be deemed out of Court unless he declare within one year after the process is returnable. Time for declaring.

36. When the plaintiff declares against a prisoner, it shall not be necessary to make more than two copies of the declaration, of which one shall be served and another filed, with an affidavit of service; upon the office copy of which affidavit a rule to plead may be given. Declaring against prisoner.

Rule to declare,
on removal of
causes.

37. Where a cause has been removed from an inferior Court, the rule to declare may be given within four days after the end of the Term in which the writ is returned.

No rule to de-
clare in gen-
eral.

38. It shall not be necessary for a defendant in any case to give a rule to declare, except upon removals from inferior Courts; but the plaintiff may have a rule for time to declare in the Court of *Exchequer* as well as in the other Courts.

Peremptorily.

39. A rule to declare peremptorily may be absolute in the first instance.

Variance in
venue.

40. A declaration laying the venue in a different county from that mentioned in the process, shall not be deemed a waiver of the bail.

Notice of decla-
ration.

41. It shall not be deemed necessary to express the amount of damages in a notice of declaration.

Rule to plead.

42. Where an amendment of the declaration is allowed, no new rule to plead shall be deemed necessary, whether such amendment be made of the same term as the declaration, or of a different term.

PLEA, AND TIME FOR.

When plea de-
manded.

43. A demand of plea may be made at the time when the declaration is delivered, and may be indorsed thereon.

Oyer.

44. If a defendant, after craving oyer of a deed, omit to insert it at the head of his plea, the plaintiff, on making up the issue or demurrer book, may, if he think fit, insert it for him, but the costs of such insertion shall be in the discretion of the taxing officer.

Pleading with-
out imparlance.

45. If the declaration be filed or delivered so late that the defendant is not bound to plead until the next Term, the defendant may plead as of the preceding Term, within the first four days of the next Term, any plea to the jurisdiction or in abatement, or a tender, or any other similar plea.

Waiver of plea.

46. The defendant shall not be at liberty to waive his plea without leave of the Court or a Judge.

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PARTICULARS.

47. A summons for particulars and order thereon may be obtained by a defendant before appearance, and may be made, if the Judge think fit, without the production of any affidavit. Particulars.

48. A defendant shall be allowed the same time for pleading after the delivery of particulars under a Judge's order, which he had at the return of the summons; nevertheless, judgment shall not be signed till the afternoon of the day after the delivery of the particulars, unless otherwise ordered by the Judge. Pleading after.

NOTICES AND RULES, AND SERVICE THEREOF.

49. Where the residence of a defendant is unknown, notice of declaration may be stuck up in the office, but not without previous leave of the Court. Notice of declaration.

50. Service of rules and orders, and notices, if made before nine at night, shall be deemed good; but not if made after that hour. When rules, orders, and notices served.

51. It shall not be necessary to the regular service of a rule, that the original rule should be shewn, unless sight thereof be demanded, except in cases of attachment. Original rule, when shewn.

52. Where a term's notice of trial or inquiry is required, such notice may be given at any time before the first day of term. Term's notice of trial, &c.

53. A rule to reply may be given at any time when the office is open. Rule to reply.

54. Service of a rule to reply or plead any subsequent pleading, shall be deemed a sufficient demand of a replication or such other subsequent pleading. Rule to reply.

PAYMENT OF MONEY INTO COURT.

55. In all cases in which money may be paid into Court, leave to pay it in may be obtained by a side bar rule. Paying money into Court.

Defendants un-
dertaking to pay
costs.

56. On payment of money into Court, the defendant shall undertake by the rule to pay the costs; and, in case of non-payment, to suffer the plaintiff either to move for an attachment, on a proper demand and service of the rule, or to sign final judgment for nominal damages.

TRIAL, AND NOTICE THEREOF.

Notice of trial
and inquiry.

57. Notice of trial and inquiry, and of continuance of inquiry, shall be given in town; but countermand of notice of trial or inquiry may be given either in town or country, unless otherwise ordered by the Court or a Judge.

Short notice.

58. The expression "Short Notice of Trial" shall, in country causes, be taken to mean four days.

Notice of trial,
when given.

59. In all cases where the plaintiff in pleading concludes to the country, the plaintiff's attorney may give notice of trial at the time of delivering his replication, or other subsequent pleading, and, in case issue shall afterwards be joined, such notice shall be available; but if issue be not joined on such replication, or other subsequent pleading, and the plaintiff shall sign judgment for want thereof, and forthwith give notice of executing a writ of inquiry, such notice shall operate from the time that notice of trial was given as aforesaid; and in all cases where the defendant demurs to the plaintiff's declaration, replication, or other subsequent pleading, the defendant's attorney, or the defendant, if he plead in person, shall be obliged to accept notice of executing a writ of inquiry on the back of the joinder in demurrer; and in case the defendant pleads a plea in bar or rejoinder, &c., to which the plaintiff demurs, the defendant's attorney, or the defendant, if he plead in person, shall be obliged to accept notice of executing a writ of inquiry on the back of such demurrer.

At bar.

60. Notice of a trial at bar shall be given to the proper officer of the Court, before giving notice of trial to the party.

Countermand in

61. In country causes, or where the defendant resides

more than forty miles from town, a countermand of notice of trial shall be given six days before the time mentioned in the notice for trial, unless short notice of trial has been given. country causes.

62. In town causes, where the defendant lives within forty miles of town, two days' notice of countermand shall be deemed sufficient. In town causes.

63. The rule for a view may in all cases be drawn up by the officer of the Court, on the application of the party, without affidavit or motion for that purpose. View.

NEW TRIAL, MOTION IN ARREST OF JUDGMENT, &c.

64. If a new trial be granted, without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed on the second. Costs of new trials.

65. No motion in arrest of judgment, or for judgment *non obstante veredicto*, shall be allowed after the expiration of four days from the time of trial, if there are so many days in term, nor in any case after the expiration of the term, provided the Jury process be returnable in the same term. Arrest of judgment.

JUDGMENT, AND TIME FOR SIGNING.

66. Judgment for want of a plea after demand, may in all cases be signed at the opening of the office in the afternoon of the day after that on which the demand was made, but not before. Judgment for want of plea.

67. After the return of a writ of inquiry, judgment may be signed at the expiration of four days from such return; and, after a verdict or nonsuit, on the day after the appearance day of the return of the *distringas* or *habeas corpora*, without any rule for judgment. After inquiry or verdict.

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JUDGMENT AS IN CASE OF A NONSUIT.

Judgment as in
case of nonsuit.

68. A rule *nisi* for judgment as in case of a nonsuit may be obtained on motion, without previous notice; but in that case it shall not operate as a stay of proceedings.

When moved
for.

69. No motion for judgment as in case of a nonsuit shall be allowed after a motion for costs for not proceeding to trial for the same default; but such costs may be moved for separately, *i. e.*, without moving at all for judgment as in case of a nonsuit, or after such motion is disposed of; or the Court, on discharging a rule for judgment as in case of a nonsuit, may order the plaintiff to pay the costs of not proceeding to trial; but the payment of such costs shall not be made a condition of discharging the rule.

No entry of is-
sue necessary.

70. No entry of the issue shall be deemed necessary to entitle a defendant to move for judgment as in case of a nonsuit, or to take the cause down to trial by proviso.

Trial by proviso.

71. No trial by proviso shall be allowed in the same term in which the default of the plaintiff has been made, and no rule for a trial by proviso shall be necessary.

WARRANT OF ATTORNEY AND COGNOVIT.

Warrant of at-
torney or *cogno-
vit* executed by
prisoner.

72. No warrant of attorney to confess judgment, or *cognovit actionem*, given by any person in custody of a sheriff or other officer upon mesne process shall be of any force, unless there be present some attorney on behalf of such person in custody expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant or *cognovit* before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and declare himself to be attorney for the defendant, and state that he subscribes as such attorney.

Judgment on
old warrant of
attorney.

73. Leave to enter up judgment on a warrant of attorney above one and under ten years old must be obtained

by a motion in term, or by order of a judge in vacation; and if ten years old or more, upon a rule to shew cause.

1832.

COSTS.

74. No costs shall be allowed on taxation to a plaintiff, upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs.

Costs of counts and issues against plaintiff.

EXECUTION.

75. It shall not be necessary that any writ of execution should be signed; but no such writ shall be sealed till the judgment paper, *postea*, or inquisition, has been seen by the proper officer.

Writs of execution not signed—sealing.

76. A writ of *habere facias possessionem* may be sued out without lodging a *præcipe* with the officer of the Court.

H. f. poss. without *præcipe*.

77. In actions commenced by bill, a *ca. sa.* to fix bail shall have eight days between the *teste* and return; and in actions commenced by original, fifteen; and must, in *London* and *Middlesex*, be entered four clear days in the public book at the Sheriff's office.

Ca. sa. to fix bail.

SCIRE FACIAS.

78. A plaintiff shall not be allowed a rule to quash his own writ of *scire facias*, after a defendant has appeared, except on payment of costs.

Sci. fa. quashed.

79. A *scire facias* to revive a judgment more than ten years old shall not be allowed without a motion for that purpose in term, or a Judge's order in vacation; nor, if more than fifteen, without a rule to shew cause.

Sci. fa. to revive judgment.

80. A *scire facias* upon a recognizance taken in Serjeants' Inn, or before a Commissioner in the country, and recorded at *Westminster*, shall be brought in *Middlesex* only; and the form of the recognizance shall not express where it was taken.

Sci. fa. on recognizance.

Judgment in
sci. fa.

81. No judgment shall be signed for non-appearance to a *scire facias* without leave of the Court or a Judge, unless the defendant has been summoned; but such judgment may be signed by leave after eight days from the return of one *scire facias*.

Sci. fa. by bail.

82. A notice in writing to the plaintiff, his attorney, or agent, shall be a sufficient appearance by the bail or defendant on a *scire facias*.

ERROR.

Writ of error.

83. A writ of error shall be deemed a *supersedeas* from the time of the allowance.

Stay of proceedings.

84. To entitle bail to a stay of proceedings pending a writ of error, the application must be made before the time to surrender is out.

SUPERSEDEAS.

Proceedings
against prisoner.

85. The plaintiff shall proceed to trial, or final judgment, against a prisoner within three terms inclusive after declaration, and shall cause the defendant to be charged in execution within two terms inclusive after such trial or judgment; of which the term in or after which the trial was had shall be reckoned one.

List of supersedeable prisoners.

86. The Marshal of the *King's Bench* Prison, and the Warden of the *Fleet*, shall present to the Judges of the Courts of *King's Bench*, *Common Pleas*, and *Exchequer*, in their respective Chambers at *Westminster*, within the first four days of every Term, a list of all such prisoners as are supersedeable; shewing as to what actions and on what account they are so, and as to what actions (if any) they still remain not supersedeable.

Cause of detain-
er entered.

87. If, by reason of any writ of error, special order of the Court, agreement of parties, or other special matter, any person detained in the actual custody of the Marshal of the *King's Bench* Prison or Warden of the *Fleet*, be not entitled to a *supersedeas* or discharge to which such

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prisoner would, according to the general rules and practice of the Court, be otherwise entitled for want of declaring, proceeding to trial or judgment, or charging in execution, within the times prescribed by such general rules and practice, then, and in every such case, the plaintiff or plaintiffs at whose suit such prisoner shall be so detained in custody, shall, with all convenient speed, give notice in writing of such writ of error, special order, agreement, or other special matter, to the Marshal or Warden, upon pain of losing the right to detain such prisoner in custody by reason of such special matter; and the Marshal or Warden shall forthwith, after the receipt of such notice, cause the matter thereof to be entered in the books of the prison, and shall also present to the Judges of the respective Courts from time to time a list of the prisoners to whom such special matter shall relate, shewing such special matter, together with the list of the prisoners supersedeable.

88. All prisoners who have been or shall be in the custody of the Marshal or Warden for the space of one calendar month after they are supersedeable, although not superseded, shall be forthwith discharged out of the *King's Bench* or *Fleet* Prison as to all such actions in which they have been or shall be supersedeable.

Prisoners supersedeable, when discharged.

89. The order of a Judge for the discharge of a prisoner on the ground of a plaintiff's neglect to declare, or proceed to trial or final judgment or execution in due time, may be obtained at the return of one summons served two days before it is returnable; such order in town causes being absolute, and, in country causes, unless cause shall be shewn within four days, or within such further time as the Judge shall direct.

Order to discharge.

90. A rule or order for the discharge of a debtor who has been detained in execution a year for a debt under 20*l.*, may be made absolute in the first instance, on an affidavit of notice given ten days before the intended ap-

Prisoner in execution under 20*l.*

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plication, which notice may be given before the year expires.

ATTORNEY AND HIS BILL.

Summons to tax
attorney's bill.

91. An order to deliver or tax an attorney's bill may be made at the return of one summons, the same having been served two days before it is returnable.

One appoint-
ment.

92. One appointment only shall be deemed necessary for proceeding in the taxation of costs or of an attorney's bill.

Set off—Attor-
ney's lien.

93. No set off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set off is sought; provided, nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may be deducted.

MISCELLANEOUS.

Pluries capias
not stamped for
exigent.

94. It shall not be necessary that a *pluries capias* be stamped by the clerk of the warrants, to authorize the *Ex-igenter* to make out an *exigent*.

Charging defen-
dant in execu-
tion.

95. In order to charge a defendant in execution, it shall not be necessary that the proceedings be entered of record.

Side bar rules.

96. Side bar rules may be obtained on the last as well as on other days in term.

Rules enlarged.

97. A rule may be enlarged, if the Court think fit, without notice.

Security for
costs.

98. An application to compel the plaintiff to give security for costs must, in ordinary cases, be made before issue joined.

Compounding
penal action.

99. Leave to compound a penal action shall not be given, in cases where part of the penalty goes to the Crown, unless notice shall have been given to the proper officer; but in other cases it may.

Pleas in person.

100. Where the defendant, after having pleaded, is allowed to confess the action, he may withdraw his plea in

person, without the appearance of the attorney or his clerk for that purpose before the officer of the Court.

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101. There shall be no rule for the Sheriff to return a good Jury upon a writ of inquiry, but an order shall be made by a Judge upon summons for that purpose.

Good Jury.

102. An order upon the lord of a manor, to allow the usual limited inspection of the Court rolls, on the application of a copyhold tenant, may be absolute in the first instance, upon an affidavit that the copyhold tenant has applied for and been refused inspection.

Inspection of Court rolls.

103. In cases where the application for a rule to change the *venue* is made upon the usual affidavit only, the rule shall be absolute in the first instance; and the *venue* shall not be brought back, except upon an undertaking of the plaintiff to give material evidence in the county in which the *venue* was originally laid.

Changing *venue*.

104. Where money is paid into Court in several actions, which are consolidated, and the plaintiff, without taxing costs, proceeds to trial on one and fails, he shall be entitled to costs on the others up to the time of paying money into Court.

Paying money into Court.

105. After judgment by default, the entry of any subsequent continuances shall not be required.

Entry of continuances.

106. To entitle a plaintiff to discontinue after plea pleaded, it shall not be necessary to obtain the defendant's consent, but the rule shall contain an undertaking on the part of the plaintiff to pay the costs, and a consent, that, if they are not paid within four days after taxation, defendant shall be at liberty to sign a *nonpros*.

Discontinuance after plea.

107. It shall not be necessary that any pleadings which conclude to the country be signed by counsel.

Pleas to country.

108. In all special pleadings, where the plaintiff takes issue on the defendant's pleading, or traverses the same, or demurs, so that the defendant is not let in to allege any new matter, the plaintiff may proceed without giving a rule to rejoin.

Rule to rejoin.

Imparances.

109. It shall not be necessary that imparlances should be entered on any distinct roll.

Pauper, when to pay costs.

110. Where a pauper omits to proceed to trial, pursuant to notice or an undertaking, he may be called upon by a rule to shew cause why he should not pay costs, though he has not been dispaupered.

II.

**Debt and costs
to be indorsed
on writ.**

AND IT IS FURTHER ORDERED, That, upon every bailable writ and warrant, and upon the copy of any process served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ or process, arrest, or copy and service and attendance to receive debt and costs; and, that upon payment thereof, within four days, to the plaintiff, or his attorney, further proceedings will be stayed. But the defendant shall be at liberty, notwithstanding such payment, to have the costs taxed; and, if more than one-sixth shall be disallowed, the plaintiff's attorney shall pay the costs of taxation.

Form of indorsement.

THE INDORSEMENT shall be written or printed in the following form:--

" The plaintiff claims for debt,
 " and for costs. And, if the
 " amount thereof be paid to the plaintiff or
 " his attorney within four days from the ser-
 " vice hereof, further proceedings will be
 " stayed."

III.

**Plaintiff may
declare *de bene
esse* four days
after H. and T.
Terms.**

AND IT IS FURTHER ORDERED, That, in *Hilary* and *Trinity* Terms, a plaintiff in any country cause may file or deliver a declaration *de bene esse* within four days after the end of the term, as of such term.

IV.

**Recital of writs
in declarations.**

AND IT IS FURTHER ORDERED, That the rules heretofore

made in the Courts of *King's Bench* and *Common Pleas* respectively, for avoiding long and unnecessary repetitions of the original writ in certain actions therein mentioned, shall be extended and applied, in the Courts of *King's Bench*, *Common Pleas*, and *Exchequer of Pleas*, to all personal and mixed actions; and that in none of such actions shall the original writ be repeated in the declaration, but only the nature of the action stated, in manner following: viz. *A. B.* was attached to answer *C. D.* in a plea of trespass, or in a plea of trespass and ejectment, or as the case may be; and any further statement shall not be allowed in costs.

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V.

AND IT IS FURTHER ORDERED, That, upon staying proceedings either upon an attachment against the Sheriff for not bringing in the body, or upon the bail bond, on perfecting bail above, the attachment or bail bond shall stand as a security, if the plaintiff shall have declared *de bene esse*, and shall have been prevented, for want of special bail being perfected in due time, from entering his cause for trial, in a town cause, in the term next after that in which the writ is returnable; and, in a country cause, at the ensuing Assizes.

When bail bond, &c., is to stand as a security.

VI.

AND IT IS FURTHER ORDERED, That the expense of a witness called only to prove the copy of any judgment, writ, or other public document, shall not be allowed in costs, unless the party calling him shall, within a reasonable time before the trial, have required the adverse party, by notice in writing, and production of such copy, to admit such copy, and unless such adverse party shall have refused or neglected to make such admission.

Costs of proving copy of public document.

VII.

AND IT IS FURTHER ORDERED, That the expense of a

Costs of proving handwriting.

1832.

witness called only to prove the handwriting to, or the execution of, any written instrument stated upon the pleadings, shall not be allowed, unless the adverse party shall, upon summons before a Judge, a reasonable time before the trial (such summons stating therein the name, description, and place of abode of the intended witness), have neglected or refused to admit such handwriting or execution, or unless the Judge, upon attendance before him, shall indorse upon such summons, that he does not think it reasonable to require such admission.

VIII.

Time, how computed.

AND IT IS FURTHER ORDERED, That, in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the Courts, the same shall be reckoned exclusively of the first day, and inclusively of the last day, unless the last day shall happen to fall on a *Sunday, Christmas Day, Good Friday*, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day also.

Commencement of rules.

AND IT IS FURTHER ORDERED, That the above rules shall take effect on the first day of next *Easter Term*.

TENTERDEN,
N. C. TINDAL,
LYNDHURST,
J. BAYLEY,
J. A. PARK,
W. GARROW,
J. LITTLEDALE,
S. GASELEE,

J. VAUGHAN,
J. PARKE,
W. BOLLAND,
J. B. BOSANQUET,
W. E. TAUNTON,
E. H. ALDERSON,
J. PATTESON.

END OF HILARY TERM.

REPORTS OF CASES,
 DETERMINED ON
 POINTS OF PRACTICE
 IN THE COURTS OF
Common Pleas & Exchequer.

COURT OF COMMON PLEAS,

Michaelmas Term,

IN THE FIRST YEAR OF THE REIGN OF WILLIAM IV.

PITT *v.* The Sheriff of MIDDLESEX, in the Cause of
 HAMILTON *v.* JONES and Others.

1830.

*Monday,
 Nov. 8th.*

MR. Pitt, (in person), applied for an attachment against the Sheriff of *Middlesex*, for taking the applicant immediately after his arrest to the *Fleet* prison, contrary to the provisions of the 32 *Geo. 2*, c. 28, s. 2; but his affidavit omitted to state that he had named any "safe and convenient dwelling-house," to which he had required that he should be carried.

If a defendant, on being arrested, does not name any safe and convenient dwelling-house within the county in which he is arrested, he may be taken immediately to gaol, notwithstanding the 32 *Geo. 2*, c. 28, s. 2.

Per Curiam.—The defendant has not brought himself within the act. He should have named some safe and convenient dwelling-house "within the county," &c., in which he was arrested, whither the officer was to convey

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PITT
v.
JONES.

him. As he did not, the officer could not judge of the safety or convenience of the place.

Rule refused (a).

(a) See this case also reported in 4 M. & P. 726.

Thursday,
Nov. 11th.

Holy Thursday not being a juridical day, cannot be reckoned as one of the four clear days for a *sci. fa.* against bail to lie in the office.

SCOTT v. LARKINS.

ON shewing cause against a rule for setting aside a *ca. sa.* against the bail in this action for irregularity, it appeared, that the alleged irregularity was, that the first writ of *sci. fa.* had not lain in the office four clear juridical days, according to the practice of the Court. It had lain from *Saturday* till the *Friday* following, and the intervening *Thursday* was *Holy Thursday*.

Taddy, Serjt., opposed the rule, and cited *Creswell v. Green* (a).

Wilde, Serjt., supported the rule, and cited *Wathen v. Beaumont* (b), and *Howard v. Smith* (c).

Lord Chief Justice TINDAL.—The object of the rule is, that the bail should have four clear days, in which to go freely to search the office, to ascertain whether any writ has been lodged in the cause against them. Although, on *Holy Thursday* the office may be open on payment of extra fees, the bail are not placed in the situation intended by the rule. Cases of this description, where the Sheriff is directed to return two *nihils*, (doing violence to the language of the writ), ought to be watched as narrowly as possible.

The other Judges concurred—

Rule absolute (d).

(a) 14 East, 537.

(c) 1 Barn. & Ald. 528.

(b) 11 East, 271.

(d) In this case, the Sheriff had

1830.

Friday,
Nov. 19th.ROE *d.* DURANT *v.* MOORE.

IN this case, the tenant, besides entering into the common consent rule, had given the undertaking, and entered into the recognizance, required by 1 *Geo.* 4, c. 87, s. 1. A verdict was found for the plaintiff. The defendant obtained a writ of error, and entered into his own recognizance only, to prosecute it, conformably to the provisions of the 16 & 17 *Car.* 2, c. 8, s. 3, for staying execution on bringing writs of error upon judgments in ejectment. On application to Mr. Justice *Gaselee*, he ordered the defendant to procure two sufficient sureties to enter into recognizance in the same amount as that originally entered into, on the defendant being admitted to defend, in addition to his own recognizance; and in case of the defendant's default to do so, the lessor of the plaintiff to be at liberty to issue execution. The defendant did not comply with this order, and he was ejected. A rule to set aside the Judge's order and all subsequent proceedings having been obtained—

Where a defendant in ejectment has given the undertaking, and entered into the recognizances required by 1 *Geo.* 4, c. 87, s. 1, and a verdict is found against him, he cannot, under s. 3 of that act, bring a writ of error without giving two additional sureties.

Russell, Serjt., shewed cause, and cited *Cave v. Massey* (a), *Doe d. Morgan v. Roe* (b).

Wilde, Serjt., supported the rule.

been directed to return two *nihils*, which practice the Court greatly disapproved in *Beddington v. Beddington*, 2 M. & P. 479. The above case will also be found reported in 4 M. & P. 748, and 7 Bing. 109. It was recognised in *Fraser v. Miller*, ante, p. 141. See also an *Anonymous* case, ante, p. 142. It will be seen, that R. 8, H. T. 2 Will. 4, ante, p. 200, does not interfere with this decision, as that rule only refers to

“ cases in which any particular number of days *not* expressed to be *clear* days is prescribed by the rules or practice of the Courts;” and, moreover, applies to the last of such days, and not the intermediate ones.

(a) 5 D. & R. 624; 3 B. & C. 735, S. C.

(b) 3 Bing. 169; S. C. nom. *Doe d. Morgan v. Frisby*, 10 J. B. Moore, 574.

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d.
DURANT
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MOORE.

TINDAL, C. J.—The question here is, whether, since the 1 *Geo.* 4, c. 87, came into operation, where the provisions mentioned in the 1st section have been resorted to, the defendant is at liberty to sue out a writ of error to operate a stay of proceedings, without pursuing the course pointed out by the 3rd section? Upon the best consideration I have been able to give the subject, I am of opinion that he is not.

It will be observed, that the direction given in sect. 1 is not an undertaking which the defendant is bound at all events to enter into. On the contrary, the rule for the undertaking is a rule *nisi*, in the first instance, against which he may shew cause; and the Court will only require him to do that which is reasonable. The defendant is not now in the condition of a defendant in an ordinary ejectment; he is bound by his undertaking to give the plaintiff (on his obtaining a verdict) a judgment of the term preceding the trial. Clogged with this undertaking, he cannot stay the proceedings without complying with the requisitions of the 3rd section of the statute, which enacts —“ That, in all cases in which an undertaking shall have been given and security found, as prescribed by the first section, upon the tenant's appearing to defend, if upon the trial a verdict shall pass for the plaintiff, but it shall appear to the Judge before whom the same shall have been had, that the finding of the Jury was contrary to the evidence, or that the damages given were excessive, it shall be lawful for the Judge to order the execution of the judgment to be stayed absolutely, till the fifth day of the term then next following, or till the next session, assize, or court-day, (as the case may be); which order the Judge shall in all cases make, upon the requisition of the defendant, in case he shall forthwith undertake to find, and on condition that within four days from the day of trial he shall actually find, security, by the recognizance of himself and two sufficient sureties, in such reasonable sum as the Judge shall direct, conditioned not to commit any waste or acts

in the nature of waste, or other wilful damage, and not to sell or carry off any standing crops, hay, straw, or manure, produced or made (if any) upon the premises, and which may happen to be thereupon, from the day on which the verdict shall have been given, to the day on which execution shall finally be had upon the judgment, or the same be set aside, as the case may be: Provided always, that the recognizances last above mentioned shall immediately stand discharged and be of no effect, in case a writ of error shall be brought upon such judgment, and the plaintiff in such writ shall become bound with two sureties unto the defendant in the same, in such sum and on such condition as may be conformable to the provisions respectively made for staying execution on bringing writs of error upon judgments in actions of ejectment, by an act passed in *England* in the sixteenth and seventeenth years of the reign of King *Charles* the Second (a)."

By this section two modes are specifically pointed out, by which execution may be stayed, *first*, by order of the Judge, where the verdict is against evidence; *secondly*, on the defendant finding security not to commit waste. When this latter mode is had recourse to, the section provides, that if the defendant brings a writ of error, he shall become bound with two sufficient sureties in such sum and with such conditions as are required by the 16 & 17 *Car.* 2, c. 8, s. 3; and that then the intermediate recognizance (not to commit waste) shall be of no effect. It therefore clearly appears to me, that, where the course pointed out by the 1st section of the 1 *Geo.* 4, c. 87, has been resorted to, the stay of execution contemplated by the Legislature is to rest upon the recognizance or undertaking mentioned in the 3rd section. The defendant has overstepped this provision, and gone back to the old act. In order, however, to get rid of the judgment, and of his undertaking, pursuant to the 1st section of the 1 *Geo.* 4, a defendant,

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d.
DURANT
v.
MOORE.

(a) Ch. 8, s. 3.

1830.

ROE
d.
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must adopt one of the courses pointed out by the 3rd section. The defendant, in this case, has not pursued either of those courses; and, therefore, I am of opinion that the writ of error does not operate a stay of the proceedings.

The other Judges concurred.

Rule discharged (a).

(a) This case is also reported *ante*, p. 143; and 1 Reg. Gen. H. in 4 M. & P. 761, and 7 Bing. 124. T. 2 Will. 4, s. 27, *ante*, p. 186. See *Doe* d. Sir N. C. Tindal v. *Roe*,

Monday,
Nov. 22nd.

The acknowledgment of a warrant of attorney for suffering a recovery in *Wales* may be taken by an attorney of the Court of Great Sessions, although the tenant to the *præcipe* does not reside within the principality.

DAVIES, Demandant; DAWKINS, Tenant; EVANS, Vouchee.

JONES, Serjt., moved that this recovery might pass. By a rule of this Court, of *Michaelmas* Term, 39 *Geo.* 3, it is ordered, that "no common recovery or fine shall be suffered to pass, unless the taking of the warrants of attorney be before one of the Justices or Barons in *Westminster Hall*, or one of the Serjeants-at-law; unless an affidavit be made and filed, stating that the commissioners taking the same are, to the best of the deponent's belief, either barristers of five years' standing or solicitors or attorneys of some of the Courts of *Westminster Hall*." The stat. 1 *Will.* 4, c. 70, s. 16, authorizes attorneys of the Great Sessions in *Wales* to practise in all actions or suits in the Courts at *Westminster*, where the parties reside within the principality of *Wales*.

In this case, the party before whom the acknowledgment was taken was not an attorney of one of the Courts at *Westminster*, but only an attorney of the Great Sessions in *Wales*. The tenant to the *præcipe* was an attorney residing in *London*.

TINDAL, C. J.—This is not an action or suit brought against a party residing within the principality of *Wales*; and, therefore, the enabling clause of the stat. 1 *Will.* 4, c. 70, does not apply. It seems to me, however, that this case does not fall within the rule of the Court, which requires the warrant of attorney to be taken before a Judge or Serjeant-at-law, a barrister of five years' standing, or an attorney or solicitor of one of the Courts at *Westminster*; for, that rule only applies to fines and recoveries levied or suffered in *England*. I therefore see no objection to the passing of this recovery.

Fiat (a).

(a) Under the rule of Court, attorney for suffering a recovery. H. T. 14 Geo. 3, attorneys of the Court of Great Sessions in *Wales* were not competent to take the acknowledgment of a warrant of attorney for suffering a recovery. See *Mullins*, demandant, 4 Taunt. 584. See this case reported in 4 M. & P. 789, and 7 Bing. 149.

1830.

DAVIES,
Demandant;
DAWKINS,
Tenant;
EVANS,
Vouchee.

FULLER v. COOMBE.

Tuesday,
Nov. 23rd.

IN this case a rule was obtained for setting aside a *fi. fa.* for irregularity, on the ground, that it had been sued out after a writ of error allowed and bail put in, and not excepted to.

If a writ of error be sued out for the mere purpose of delay, and the bail put in thereon are men of straw, the plaintiff may, notwithstanding, issue execution.

Wilde, Serjt., shewed cause, and produced an affidavit, shewing that the writ of error was sued out merely for delay, and that the bail were persons of no property. He cited *Ward v. Levi (a)*, and *Browne v. Brown (b)*.

Per Curiam.—This case is decided by *Browne v.*

(a) 2 Dow. & Ryl. 421; S. C. 1 269, n.
Barn. & Cress. 268. See also (b) 4 Bing. 38; S. C. 12 J. B.
Crum v. Kitchen, 1 Barn. & Cres. Moore, 172.

1830.

FULLER

v.

COOMBE.

Brown. The practice in question is a fraud upon the Court, and ought in all cases to be put a stop to.

Rule discharged with costs (a).

(a) See this case also reported in 4 M. & P. 792.

Wednesday,
Nov. 24th.

ANONYMOUS.

A single instance of employment as an attorney at an election, is not a sufficient practising to entitle him to privilege from arrest.

AN application was made to discharge an attorney of the Court out of custody, he having been arrested on mesne process, and to have the bail bond delivered up to be cancelled, upon an affidavit, stating that he was arrested while in the discharge of professional duties, at an election.

Andrews, Serjt., shewed cause, and cited *Brooke v. Bryant* (a).

TINDAL, C. J.—The privilege of the attorney is only allowed him for the benefit of his clients. It is necessary, therefore, before a party seeks to avail himself of that privilege, that he should shew himself to be actually practising at the time. In the present case, it is not so sworn. By his shewing one instance of employment *dehors* the scope of his business as an attorney, it would seem pretty clear that he has no other business to shew. I think the rule ought to be discharged.

The rest of the Court concurred.

Rule discharged (b).

(a) 7 Term Rep. 25. (b) See this case reported in 4 M. & P. 810.

1830.

HAMILTON v. PITT and Others.

*Monday,
Nov. 29th.*

IN this case, which was an action for business done by an attorney for the defendants, as assignees under a commission of bankrupt, the defendant, *Pitt*, was holden to special bail for 78*l.*; among other items was a sum of 42*l.* Of this no evidence was produced, no bill thereof having been delivered according to the 2 *Geo. 2*, c. 23, s. 23, one month before the commencement of the action. Other reductions were made, and the plaintiff obtained a verdict for 15*l.* only. For the above sum of 42*l.* the defendant *Pitt* was again arrested. A rule for discharging him out of custody, on filing common bail, was obtained, and cause having been shewn—

Where a plaintiff arrests a defendant, and on the trial recovers a part of his demand and his costs, he cannot afterwards hold the defendant to bail for another part of the same demand.

TINDAL, C. J., said—I think this rule ought to be made absolute. The general rule upon this subject is, that a defendant cannot be held to bail a second time for any part of the demand included in a former action, where the plaintiff has obtained costs in such former action. Here, the plaintiff has got his costs, and the defendant has been again arrested for this sum of 42*l.* This is not like those cases, in which the plaintiff had been mulcted in the first instance.

The rest of the Court concurred.

Rule absolute (a).

(a) See this case reported in 4 M. & P. 868, and 7 Bing. 230. See also 1 Tidd, Prac. 174, ed. 9.

1830.

Monday,
Nov. 29th.

A bill for business done under a commission of bankruptcy need not be delivered a month before action brought thereon.

SAME *v.* SAME.

A rule was also obtained for costs under the 43 *Geo.* 3, c. 46, s. 3, on the ground, that the defendant had been arrested and held to bail, without reasonable or probable cause, for a sum greater than was subsequently found to be due to the plaintiff. The arrest was for 78*l.*, and the sum recovered 15*l.* In the former sum, however, was included the before mentioned sum of 42*l.*

Taddy, Serjt., shewed cause, and cited *Crowder v. Davis* (a).

TINDAL, C. J.—At the trial it appeared, that, as to the 42*l.*, no bill had been delivered one month before action brought. That sum, therefore, was thrown out of the case. Under these circumstances, the plaintiff might reasonably and probably think, that he had a right to hold the defendant to bail for that sum; more particularly as the Court of *Exchequer* has lately, in *Crowder v. Davis*, held that an attorney's bill for business in bankruptcy need not be delivered one month before action brought, nor be taxed by the commissioners under the 6 *Geo.* 4, c. 16, s. 14, before a party is sued thereon. The present rule must therefore be discharged.

The other Judges concurred.

Rule discharged (b).

(a) 3 *Younge & Jerv.* 433.

4 *Moore & Payne*, 869; and 7

(b) This case is also reported in *Bing.* 232.

Hilary Term,

IN THE FIRST YEAR OF THE REIGN OF WILLIAM IV.

BUCKWORTH v. LEVI.

1831.

Monday,
Jan. 17th.

A RULE was obtained for discharging the defendant out of custody, on entering a common appearance, on the ground of a defect in the affidavit of debt. It was an action by an indorsee against the drawer of a bill of exchange. The affidavit of debt stated no default by the acceptor. The want of this allegation was the defect in question.

The affidavit of debt in an action by an indorsee against the drawer, must allege the default of the acceptor.

Jones, Serjt., shewed cause, and cited *Warmesley v. Macy* (a).

Spankie, Serjt., supported the rule, and cited *Machu v. Fraser* (b), and *Tidd's Forms*, Append. to the 9th ed. of the *Practice*, p. 79.

TINDAL, C. J.—The defendant, as drawer of the bill, is not primarily liable to the holder; his liability arises only on failure of payment by the acceptor. In such a case as the present, it should therefore appear in the affidavit of debt, that the acceptor has made default. This has not been done; for it contains no suggestion, either of non-acceptance or non-payment by the drawee. The

(a) 5 J. B. Moore, 52; S. C. 2 Bing. & B. 338.

(b) 7 Taunt. 171; S. C. 2 Marsh. 483.

1831.
 BUCKWORTH
 v.
 LEVL.

affidavit, therefore, is defective, and the present rule must be made absolute.

The other Judges concurred.

Rule absolute (a).

(a) This case is also reported in 251; and was recognised by the 5 Moore & Payne, 23; 7 Bing. *King's Bench, ante, p. 122, and post.*

Friday,
 Jan. 21st.

SMITH v. TAYLOR.

Charges in an attorney's bill for attending and advising his client, after the latter had been served with a writ, and attending and advising him in an action brought against him, are taxable items within the 2 Geo. 2, c. 23, s. 23.

Money advanced by the attorney to the defendant, to pay the debt and costs in the latter action, is a disbursement within the statute, and cannot be recovered in an action for money lent, although not included in the bill.

THIS was an action brought to recover the sum of 53*l.* 3*s.* 7*d.*, for work and labour done by the plaintiff as an attorney, and for money lent. Among the items in the plaintiff's demand were, one for attending the defendant and advising him, he having been served with a writ; one for advising him on an action brought against him by a person named *Mather*; and one, for a sum of 3*l.* lent to the defendant to make up a sum to pay the debt and costs in *Mather's* action. This last item was not included in the bill delivered, and that bill had not been delivered a month previous to the commencement of the action, according to the 2 Geo. 2, c. 23, s. 23. The plaintiff was nonsuited, with leave to move to set it aside, if the Court should be of opinion that the plaintiff was entitled to recover, either the amount of his bill or the 3*l.* A rule *nisi* for that purpose having been obtained—

Spankie, Serjt., shewed cause, and cited *Crowder v. Davis* (a), *Watt v. Collins* (b), *Winter v. Payne* (c), *Mowbray v. Fleming* (d), *Hill v. Humphreys* (e), *Thwaites v. Mackerson* (f), and *Penton v. Garcia* (g).

(a) 3 Younge & Jerv. 433.

(b) 1 Ry. & Moo. 284.

(c) 6 Term Rep. 645.

(d) 11 East, 285.

(e) 2 Bos. & Pul. 345.

(f) 1 Moo. & Malk. 199.

(g) 3 Esp. 152; S. C. 11 East, 286, n.

Taddy, Serjt., and *Jones*, Serjt., supported the rule, and after distinguishing the cases cited in shewing cause from the present, cited *Fenton v. Correa* (a), *Burton v. Chatterton* (b), *Prothero v. Thomas* (c).

1831.

SMITH
v.
TAYLOR.

TINDAL, C. J.—I thought at the trial, and still retain the same opinion, that the two last items in the plaintiff's bill were taxable charges, and therefore that his demand fell within the terms and meaning of the 2 Geo. 2, c. 23, s. 23. The items in question were the charges made by the plaintiff, an attorney, for attending the defendant in his character of attorney, and advising him in two suits. The last is clearly a charge for an attendance and advising as to a step to be taken in the progress of a suit. The question then is, whether the plaintiff having charged a fee for the advice given in that case, it is not a fee or charge for business done in an action or suit within the scope and meaning of the statute? In *Watt v. Collins*, a charge by an attorney for attending, by the desire of the defendant, two persons who had agreed to bail him, was held to be a taxable item within the statute, although the proposed bail were not found to be competent to justify. In *Winter v. Payne*, a charge for attending and taking instructions to commence an action, and for drawing and engrossing an affidavit of debt, and attending a party to get him sworn thereto, were held to be charges for business done in Court, although the affidavit was never filed, and no writ was ever taken out upon it; and the Court said, that the act of Parliament being beneficial to the subject, ought to receive a liberal construction. Here, however, it appears by the first item, that the defendant had been served with a writ previously to the plaintiff's attendance and conference thereon. In *Sandom v. Bourn* (d), an attorney brought an action to recover a

(a) 1 Ry. & Moo. 262.

Marsh. 539.

(b) 3 Barn. & Ald. 489.

(d) 4 Campb. 68.

(c) 6 Taunt. 196; S. C. 1

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 v.
 TAYLOR.

charge for preparing a warrant of attorney for the defendant; and Lord *Ellenborough* said:—"The preparing of a warrant of attorney is with a view to business to be done in Court; and the expense comes under the head of 'Fees at Law.'" But a warrant of attorney is not an act in Court until it is duly filed; and in *Weld v. Crawford* (a), where one item of an attorney's bill was for drawing and preparing a warrant of attorney to confess a judgment, Lord Chief Justice *Abbott*, after referring to the former decisions on the subject, acceded to an objection raised for the defendant, that that item rendered the whole of the bill taxable, although the instrument had not been executed. It therefore seems to me that the plaintiff has charged the defendant certain fees, the amount of which he has a right to question before the Prothonotary, who has a power to reduce them in case of an overcharge. This then being a remedial statute, although the items in question may not be strictly charges for business done in Court, yet I think they fall within the operation of the act. With respect to the 3*l.*, as it was proved to have been advanced by the plaintiff to the defendant for the express purpose of discharging the debt and costs in the action brought against the latter by *Mather*, it is a disbursement in the conduct or progress of the suit, and falls also within the meaning of the statute.

PARK, J., and BOSANQUET, J., concurred, and ALDERSON, J., dissented.

Rule discharged (b).

(a) 2 Stark. Rep. 538. See also *Wilson v. Gutteridge*, 4 Dow. & Ry. 736; S. C. 3 B. & C. 157. (b) See this case also reported in 5 Moore & Payne, 66; and 7 Bing. 259.

1831.

*Monday,
Jan. 21st.*

PRICE v. SEVERNE.

THIS was an action of trespass for an assault. A verdict was found for the plaintiff, and a new trial granted, on the ground of excessive damages. The defendant had pleaded not guilty. He obtained, after the new trial was granted, an order from Mr. Justice *Gaselee*, at chambers, to withdraw the general issue, and plead accord and satisfaction in its stead. A rule for discharging that order was obtained, and cause shewn against it.

Where a defendant has pleaded not guilty in an action for an assault, and a verdict has been found for plaintiff, and a new trial has been granted, on the ground of excessive damages, the Court will not allow the defendant to substitute the plea of accord and satisfaction for that of not guilty.

TINDAL, C. J.—I am of opinion that this order ought not to have been made. The only complaint by the defendant is, that the Jury have awarded excessive damages to the plaintiff. No new fact appears to have come to the defendant's knowledge since the plea of the general issue was pleaded; but he now wishes to put a new plea on the record, which will raise an entirely different issue, and may have the effect of defeating the action altogether. At all events, it might deter the plaintiff from proceeding further.

The other Judges concurred.

Order discharged (a).

(a) This case is also reported in 5 M. & P. 250, and 7 Bing. 402.

RHODES v. INNES.

*Friday,
Jan. 28th.*

IN this case a rule was obtained for setting aside the appearance entered, pursuant to the statute, by the plaintiff, for the defendant, and all subsequent proceedings. On the part of the defendant his own affidavit was produced, stating that he had never been served with a copy of a

What is equivalent to personal service.

1831.
 RHODES
 v.
 INNER.

writ or any other proceeding, before notice of declaration was left at his house; but, he did not deny that he knew of a letter containing the writ having been left with his son. On the part of the plaintiff it was sworn, that a copy of the process, inclosed in a letter, had been left with the defendant's son, at the defendant's residence; that the son was desired to give the letter to his father; and that he promised so to do.

TINDAL, C. J.—The question in this case is, whether there has been such a personal service, or what is equivalent to it, as will satisfy the 12 *Geo. 1*, c. 29, s. 1. There is no magic in the word “personal;” and a personal service of process may be waived by particular circumstances, or by the conduct of the party. Now, if the Court have any reason to believe that the defendant knew that the writ was delivered to his son, it may dispense with the necessity of personal service on the former. In *Smith v. Wintle* (a), where the plaintiff put a copy of a writ through the crevice of a door, the defendant having locked himself in, and the plaintiff saw him through the crevice, and told him what the paper put through was; the Court held the service to be sufficient, and discharged a rule obtained by the defendant for setting aside the proceedings upon an affidavit that he had never been served with process. Although no actual affidavit was made or filed, that the defendant had been personally served, yet, the defendant should have gone further, and sworn that he had never seen the letter or the writ, or taken them into his hands. I am therefore of opinion that this rule ought to be discharged.

The other Judges concurred.

Rule discharged (b).

(a) *Barnes*, 405.

(b) See this case reported in 5 *M. & P.* 153, and 7 *Bing.* 329. See *post*.

1831.

Friday,
Jan. 28th.

HENSHALL (Executrix) v. MATTHEW.

A WARRANT of attorney was executed by the defendant, authorizing one *Matthew Henshall* to enter up judgment against him for 400*l.*; and in the defeazance it was stated, that the warrant of attorney was given to secure the payment to *Henshall*, his heirs, executors, administrators, and assigns, of 200*l.* and interest, on the days and in the manner therein specified.

Where a warrant of attorney authorizes a person to enter up judgment against the defendant, and the defeazance states that the warrant is given to secure payment to that person, his heirs, &c., judgment cannot be entered up on it by his executrix, as it only authorized the testator himself to enter up judgment.

Jones, Serjt., applied, on the part of *Henshall's* executrix, to enter up judgment on the warrant of attorney, and cited *Coles v. Haden* (a), where a warrant of attorney was given to enter up judgment at the suit of *A. B.*, the testator, his heirs, executors, or administrators, and the Court allowed judgment to be entered up at the suit of the executor.

TINDAL, C. J.—In that case, the words of the warrant of attorney extended to authorize the entering up judgment at the suit of the testator, his heirs, executors, or administrators; while here, the body of the instrument authorized the testator alone to enter up judgment. An authority of this nature must be strictly pursued, and we cannot supply any supposed omissions of the parties; and although it appears by the defeazance that the warrant of attorney was given to secure to *Henshall*, the testator, “his heirs, executors, administrators, and assigns,” a particular sum, that only follows as an inference of law; and as the testator alone was empowered to enter up judgment.

(a) *Barnes*, 44. See also *Fendall v. May*, 2 M. & S. 76; *Cowie v. Alloway*, 8 T. R. 257; *Wild v.*

Sands, *Strange*, 718; and *Short v. Coglein*, 1 Anst. 225.

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ment, I think this executrix is not entitled to have her application granted.

The rest of the Court concurred.

Rule refused (a).

(a) See this case also reported in 5 M. & P. 157, and 7 Bing. 337.

Monday,
 Jan. 31st.

TAYLOR v. THOMPSON.

The Court will disallow the costs of a view, unless the names of the shewers are inserted in the writ of view.

IN this case the Prothonotary allowed the costs of a view. The plaintiff had obtained a verdict, entered up judgment, and sued out execution against the defendant. The Sheriff levied under the writ, and the defendant paid the amount of the levy and costs. A rule was obtained for the Prothonotary to review his taxation, on an affidavit stating that the writ of view did not contain the names of the shewers, and that, although the defendant's attorney attended and watched the proceedings, neither he nor the defendant had named or appointed any shewer to be present at the view.

Wilde, Serjt., shewed cause, and contended, that the application was now too late.

Per Curiam.—The stat. of the 6 Geo. 4, c. 50, s. 23, requires that two persons should be named in the writ as shewers. As, therefore, in this case, the names of the shewers were not inserted in the writ, there has been, in fact, no view as required by the statute. It was the duty of the plaintiff to have named the shewers when he applied for the rule for the view; and although the defendant might have come earlier, yet, the plaintiff cannot be entitled to the costs of the view, as he did not comply with the terms of the statute; and the defendant has sworn that neither

he nor his attorney had named or appointed any shewer to be present at the view.

Rule absolute (a).

(a) This case is also reported in See 1 Reg. Gen. H. T. 2 W.4, s. 5 M. & P. 255, and 7 Bing. 403. 63, *ante*, p. 191.

1831.

TAYLOR
v.
THOMPSON.

HEWITT v. PIGOTT.

THIS was an action against the Sheriff of *Somersetshire*, for a false return to a *fi. fa.* At the trial, two deeds were produced on the part of the defendant. One was read in evidence, and the execution of the other being admitted, it was not read. The Jury found for the plaintiff; and after a new trial had been granted on the ground of surprise, a rule for the production of both deeds by the defendant was obtained by the plaintiff. Cause was shewn against the rule.

Monday,
Jan. 31st.
Where a deed has been produced and read on a trial by one party, the Court will oblige him to permit the other party to inspect that deed, in case of a new trial.

TINDAL, C. J.—There is a great distinction between the two deeds. The first was read at the trial, and heard by the Judge and the Jury; and when the defendant applied for a new trial, there would have been no injustice in imposing upon him the condition of producing that deed for the inspection of the plaintiff, in case the rule should be made absolute. But the second deed was not given in evidence, although the plaintiff admitted that it was duly executed. It was merely referred to at the trial. It must be considered as one of the defendant's muniments, which the plaintiff has no right to inspect before the second trial.

The other Judges concurred.

Rule absolute for producing that deed which was given in evidence and read at the trial (a).

(a) This case is also reported in 5 M. & P. 252, and 7 Bing. 400.

1831.

Monday,
Jan. 31st.

DAVIDSON v. NICOL.

Where a defendant at his own expense obtained a writ of *mandamus* under 13 Geo. 3, c. 33, s. 44, for examining witnesses in *India*:—*Held*, that the plaintiff was entitled to copies of the depositions returned on paying the expense of making such copies, although he refused to pay any part of the expenses attending the writ.

THE defendant in this case obtained, at his own expense, a writ of *mandamus* under the 13 Geo. 3, c. 33, s. 44, for the examination of witnesses in *India*. The depositions were returned and filed at the Secondary's Office, and the plaintiff called there and demanded copies, which he offered to pay for. As, however, he had declined paying any part of the expenses attending the writ, the Secondary doubted, whether he was entitled to copies of the depositions. A motion having been made to restrain the Secondary from giving copies of the depositions to the plaintiff, Mr. Secondary *Griffith* stated, that although the writ was issued on the application of the defendant alone, it was the practice to furnish copies of the interrogatories and depositions, when returned, to either party who required them on payment of the costs of making such copies.

Per Curiam.—The 40th and 44th sections of the statute must be read and taken together, and the same rule of construction is applicable to both. The 44th provides, that the examination being returned, shall be given in evidence in the same manner as if the several directions before prescribed and enacted in that behalf were again repeated. In *Grillard v. Hogue* (a), we granted a *mandamus*, at the instance of the defendant, although the 44th section only enumerates persons “commencing and prosecuting actions or suits.” The 40th section concludes by stating, that “all parties concerned shall be entitled to take copies of depositions at their own costs and charges;” and it would be most absurd to confine those words to the parties applying for the *mandamus*, for they do not require the copies. Besides, it appears to have been the constant and uniform

(a) 4 B. Moore, 313; S. C. 1 B. & B. 519.

practice of this Court, and of the *King's Bench*, to grant copies to either of the parties who may require them; and that practice has never been questioned from the time the statute was passed, *viz.* in 1773, to the present day.

1831.
 ———
 DAVIDSON
 v.
 NICOL.

Rule discharged; the costs of this application to be considered and taxed as costs in the cause (a).

(a) This case is also reported in 5 M. & P. 185; and in 7 Bing. 358, *nom. Davis v. Nicholson*. In *Whytt v. M'Intosh*, 8 B. & C. 317; S. C. 2 M. & R. 133; the defendant obtained a writ of *mandamus* under s. 44 of the statute; and the plaintiff obtained a verdict. The Court of *King's Bench* held, that he was entitled to his costs of cross-examining the witnesses in *India*. But, in *Fairlie v. Parker*, 1 M. & P. 438, the plaintiffs applied for and obtained the writ. It was returned with the depositions, but the defendant did not join in the application for the writ, nor examine or cross-examine witnesses under it; and the plaintiffs obtained a verdict. The Court of *Common Pleas* was of opinion, that the plaintiffs were not entitled to the costs attending the writ, or of the office copies of the depositions. By the 1 W. 4, c. 22, s. 1, the powers of the 13 Geo. 3, c. 63, are "extended to all colonies, islands, plantations, and places under the dominion of his Majesty in foreign parts, and to the Judges of the several Courts therein, and to all actions, depending in any of his Majesty's Courts of law at *Westminster*, in

what place or country soever the cause of action may have arisen, and whether the same may have arisen within the jurisdiction of the Court to the Judges whereof the writ or commission may be directed or *elsewhere*." The 13 Geo. 3, only applied to causes of action which arose in *India*. By s. 3, of the 1 Will. 4, c. 22, the costs of every writ or commission issued under the authority of the *India* act, or of the power given by the first section of the new act, are in the discretion of the Court issuing the same. Before this enactment, the party succeeding was obliged to pay his own costs of examining witnesses on interrogatories, or taking office copies of depositions. *Stephens v. Crichton*, 2 East, 259; *Hullock on Costs*, 2nd ed. 439; 2 Tld. Prac. 813, ed. 9; *Taylor v. Royal Exchange Insurance Company*, 8 East, 393. If, however, the Court thought proper, they might be made to abide the event of the cause; 2 Tld. Prac. 813, n. ed. 9; 2 Dowl. Stat. 42, nn. (a) (c); see also *Doe d. Thorn v. Phillips*, *ante*, p. 56; and *Duckett (Bart.) v. Williams*, *post*.

Easter Term.

IN THE FIRST YEAR OF THE REIGN OF WILLIAM IV.

1831.

*Monday,
May, 2nd.*

The Court will not allow costs, to which a party may probably be entitled in one action, to be set off against costs, to which he is absolutely liable in another.

MASTERMAN and Others v. MALIN.

IN this cause, the plaintiffs had been nonsuited, and costs taxed for the defendant. A rule for a new trial in an action of ejectment between the same parties was pending. A rule was obtained on the part of the lessors of the plaintiffs for setting off the costs in the ejectment, against those in the present action. Cause was shewn against this rule.

Per Curiam.—We ought not to deprive the defendant of his right to the judgment of nonsuit, and the costs taxed upon it. This application appears only to be made by the plaintiffs *quia timent*. Besides, it cannot be warranted on principle, and no authority or precedent has been referred to in its support.

Rule discharged with costs (a).

(a) This case is also reported in 5 M. & P. 324, and 7 Bing. 435.

1831.

LONERGAN and Another v. The ROYAL EXCHANGE ASSURANCE COMPANY.

Monday,
May 9th.

IN an action by the plaintiffs to recover an average loss, the question being, whether the ship was seaworthy at the time she sailed from a foreign port; the defendants, who were underwriters, filed a bill in equity for an injunction, and also for a commission to examine witnesses abroad. After the injunction was sued out, the plaintiffs sent for the captain at the *Havannah*; and shortly after his arrival, the defendants obtained an order from the Court of *Exchequer* to examine him on interrogatories, and that the plaintiffs might cross-examine him. The defendants afterwards sued out a commission to examine witnesses at the *Havannah*, which not being returned within the time prescribed by the Court of *Exchequer*, they paid the loss, without proceeding to trial. The Prothonotary refused to allow the expenses of bringing over the witness, of his detention in this country, and of his return home. A rule for reviewing the Prothonotary's taxation was obtained, and cause shewn against it.

The Court will, under particular circumstances, compel the payment by the unsuccessful party, of the expenses of bringing over from a foreign port, detaining here, and sending home, a witness, although the cause never proceeds to trial.

Per Curiam.—No misconduct can be imputed to the plaintiffs in sending for the witness. And as it was uncertain how long the injunction might remain in force, and it was ultimately dissolved through the negligence of the defendants, in not getting the commission returned, and they paid the loss claimed by the plaintiffs, without going to trial, we are of opinion, that a reasonable allowance should be made to the plaintiffs for the expenses of this witness; and, therefore, that the rule for the Prothonotary to review his taxation must be made absolute.

Rule absolute (a).

(a) The case is also reported in 5 M. & P. 447, and 7 Bing. 725; see also *Sturdy v. Andrews*, 4 Taunt. 697; *Tremaine v. Faith*, 1

Marsh. 563; S. C. 6 Taunt. 88; and *Berry v. Pratt*, 1 B. & C. 276; S. C. 2 D. & R. 424.

1831.

Monday,
May 9th.

A person, who is plaintiff both below and above, need not give bail in error.

• DUVERGIER v. FELLOWES.

IN this case, the defendant obtained judgment on demurrer. A writ of error was brought by the plaintiff in the *King's Bench*, when bail in error were put in for him, and the judgment affirmed by that Court. A writ of error upon that judgment of affirmance was afterwards brought in the House of Lords, and was still pending. Bail in error were put in in the *King's Bench*. On application by the bail to the *King's Bench*, their recognizance was discharged on payment of costs. An application was now made to discharge the bail in error in the *Common Pleas*. The case of *Freeman v. Garden* (a) was relied upon. There, Lord Chief Justice *Abbott* said—"It is quite manifest, from the language of the statute 3 *Jac.* 1, c. 8, that the case of a defendant below becoming plaintiff above in a writ of error, is the only case contemplated, in which bail is required. A person who is plaintiff both below and above need not give bail in error." The Court having taken time to consider of the application—

TINDAL, C. J., delivered the judgment of the Court.—The authority of the case in *Dowling & Ryland* was not disputed, nor the propriety of the decision of the *King's Bench* between these parties; but, it was insisted, that the present application came too late, the parties having laid by until after the judgment was affirmed, and a new writ of error brought. We think, however, that this circumstance makes no difference; for, there is no authority for compelling the entering into such a recognizance; and, therefore, it cannot possibly be enforced. We are, therefore, of opinion, that the rule should be made absolute. We see no reason, however, for dis-

(a) 1 D. & R. 184; see 6 *Geo.* 4, c. 96, s. 1.

tinguishing this case from the rule pronounced in the *King's Bench*, and therefore this rule can only be made absolute on payment of costs.

1831.
 —————
 DUVERGIER
 v.
 FELLOWES.

Rule absolute on payment of costs (a).

(a) See this case reported in 5 M. & P. 403, and 7 Bing. 463.

TREGONING, Assignee of JENNER and SOPPETT, Bank-
 rupts, v. ATTENBOROUGH.

Monday,
 May 9th.

THIS was an action of *trover* for haberdashery and silks pledged by the bankrupt with the defendant, a pawnbroker, for money advanced. The Jury found a verdict for the plaintiff for the full value of the goods. He, however, consented to take them back, it being referred to an arbitrator to ascertain to what amount they had been deteriorated in value while they remained in the defendant's possession. This amount, together with the "costs of the cause to be taxed," was to be paid to the plaintiff. Nothing was mentioned in the order as to the costs of the reference. Several meetings took place before the arbitrator, and he finally made his award. In it, he of course gave no direction as to the costs of the reference. The Prothonotary on taxation allowed the plaintiff the costs of the cause, and also the expenses incurred in measuring and valuing the goods, and in the attendance of witnesses before the arbitrator, and his fee for making the award. A rule having been obtained for reviewing the Prothonotary's taxation, cause was shewn against it.

Costs of a reference are costs in the cause, where the reference is for the benefit of the unsuccessful party.

TINDAL, C., J.—Although the order was confined to the costs of the cause, yet the expenses of ascertain-

1831.
 TREAGONING
 v.
 ATTENBOROUGH.

ing what damage the goods had actually sustained were virtually costs in the cause. It therefore seems to me, that as the defendant agreed to refer it to an arbitrator to ascertain the fact as to the deterioration of the property, the costs attending the inquiry before him may be considered as costs in the cause, as the reference was for the benefit of the defendant. If the fact left to the arbitrator had been inquired into at *Nisi Prius*, it would necessarily have caused an additional expense; and the costs of the witnesses, who might have been called to prove the deterioration of the goods in question, would have been allowed to the plaintiff as a matter of course.

The rest of the Court concurred—

Rule discharged, with costs (a).

(a) This case is also reported in 5 M. & P. 453, and 7 Bing. 733.

REGULA GENERALIS.

WHEREAS, by the ancient course of this Court, the fee paid to the Prothonotaries, for the entry of every declaration in a cause, has hitherto been of right payable at the time of filing thereof: And whereas it is expedient, that, for the future, the practice of this Court should be made conformable to that of the respective Courts of *King's Bench* and *Exchequer*, so far as regards the time of such payment: IT IS THEREFORE ORDERED, that, from and after the essoign day of next *Trinity* term, the fee due to the said Prothonotaries for such entry as aforesaid, may be paid at any time previously to entering the issue or passing the record in such cause; or, in case there shall be no record, at any time previously to signing interlocu-

tory or final judgment: and further, that, in all cases where there shall be no judgment, the said fee shall be payable at the time of taxing costs, where the proceedings in any cause are stayed, or such cause terminated by any rule of this Court, or order of a Judge.

1831.

REG. GEN.

N. C. TINDAL.

J. A. PARK.

S. GASELEE.

E. H. ALDERSON.

END OF EASTER TERM.

Trinity Term.

IN THE FIRST YEAR OF THE REIGN OF WILLIAM IV.

JACKSON v. HOPKINSON.

*Monday,
May 23rd.*

IN this case, the defendant obtained a rule for a new trial, on the ground of the absence of a material witness, on condition of paying into Court the amount of the verdict recovered by the plaintiff. The defendant afterwards filed a bill in equity against the plaintiff, for a discovery. The plaintiff failed to put in a satisfactory answer, and was therefore in contempt in the Court of *Chancery*. An application was made, on the part of the defendant, to take the money out of Court, on the ground, that, if the plaintiff put in a true answer, it would disclose a good defence to the action. It was also stated that the attendance of the witness formerly absent could now be procured. The defendant was ready to give security satisfactory to the Prothonotary, on receiving the money out of Court.

If a defendant obtains a new trial, on the ground of the absence of a material witness, upon the terms of the defendant's paying into Court the amount of the verdict, the Court will not allow the defendant to take that money out, on the ground of certain proceedings in *Chancery* probably affording a good defence to the action.

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JACKSON
v.
HOPKINSON.

Per Curiam.—The defendant asked of the Court, in the first instance, the favour of a new trial, on one specific and limited ground, *viz.* the absence, at the first trial, of a material and necessary witness. It now appears that he can procure the attendance of that witness; and there is no reason why the defendant should be placed in a more eligible situation, by having filed a bill for a discovery against the plaintiff; neither ought he to better his condition by interposing a new matter, which was not suggested to us at the time of the application for the new trial.

Rule discharged (*a*).

(*a*) See this case also reported and taking it out, see 1 Reg. Gen. in 5 M. & P. 511, and 7 Bing. 557. H. T. 2 W. 4, ss. 55, 56, and 96. As to paying money into Court,

Saturday,
May 28th.

KEELING and Another v. AUSTIN.

On a writ of error on a judgment of nonsuit, although the allowance has been served, the Court will not stay execution, unless the plaintiff points out some real error in the judgment; and the 11 Geo. 4 & 1 Will. 4, c. 70, s. 8, makes no variation in the practice on this point.

IN this case, judgment of nonsuit was signed, and the defendant's costs taxed. On the day of taxation, the plaintiff sued out a writ of error, which was allowed, and the copy of the allowance served on the defendant's attorney. The defendant, however, sued out a *fi. fa.*, and the Sheriff levied for the amount of the costs taxed. A rule *nisi* for setting aside the *fi. fa.* and all subsequent proceedings was obtained, on the ground of its having been sued out after the service of the allowance of the writ of error.

Wilde, Serjt., shewed cause, and cited *Mee v. Hopkins* (*a*), *Evans v. Sweet* (*b*), and *Box v. Bennett* (*c*).

(*a*) 2 D. & R. 208.

2 Bing. 326.

(*b*) 9 J. B. Moore, 609; S. C.

(*c*) 1 H. Bl. 432.

Bompas, Serjt., supported the rule, and cited *Hamilton v. Schofield* (a), and *Levitt v. Parry* (b). He also contended that the jurisdiction of the Court was now suspended, pending a writ of error, by the operation of the 11 *Geo.* 4 & 1 *Will.* 4, c. 70, s. 8 (c).

1831.
 KEELING
 v.
 AUSTIN.

TINDAL, C. J.—It appears to me that the recent act has not the effect of suspending the jurisdiction of the Court in such a case as the present. The only object of the 8th section of that act was to establish a new Court of error, leaving the practice as it stood before. The sole question now before the Court is—Whether this application to set aside these proceedings is consistent with former cases. In this Court, for a number of years, *viz.* from the decision in *Boy v. Bennett*, and, lately, in the Court of *King's Bench*, it has been the practice not to stay execution pending a writ of error on a judgment of nonsuit, unless some real error be pointed out by the party suing out the writ. It has been said, that a plaintiff cannot sue out execution after a writ of error brought by a defendant on a judgment by default, and that that is a stronger case than a judgment of nonsuit. But, upon a judgment by default, the error may be upon the record, in the plaintiff's declaration, and the defendant may take advantage of any such error; but, on a judgment of nonsuit, the error must have been on the part of the plaintiff himself; and he ought not to be permitted to take advantage of his own defect, unless he shews the Court the ground on which the nonsuit took place, and points out the error in the judgment, on which he seeks to set it aside (d).

The rest of the Court concurred.

Rule discharged (e).

(a) 6 J. B. Moore, 45.

4 T. R. 436.

(b) 5 T. R. 669.

(e) See this case also reported

(c) See 1 Dowl. Stat. 373.

in 5 M. & P. 599, and 7 Bing. 601.

(d) See *Kempland v. Macaulay*,

1831.

Tuesday,
May 31st.

Where a plaintiff knows that a defendant is married at the time of arresting her, although she may have represented herself as possessing separate property, the Court will discharge her on motion.

SLATER *v.* EMMA MURRAY MILLS.

INDORSEE against acceptor. The defendant in this case was a married woman, and had accepted a bill of exchange for the schooling of a son by a former husband. She had informed the drawer that she was married, but stated that she had separate property, with which she would provide for the bill. It was afterwards indorsed to the plaintiff. He arrested her, although he and his attorney knew of her coverture, and she gave bail. A rule for cancelling the bail bond and entering a common appearance having been obtained—

Taddy, Serjt., shewed cause. He cited *Luden v. Justice* (a).

Per Curiam.—As the drawer of the bill knew that the defendant was married at the time of acceptance, and the plaintiff was also aware of the fact before the arrest, this appears a fit case for the Court to interpose. But, as the defendant induced the drawer to take the bill, by a representation of her having separate property, the rule must be made absolute without costs. The case of *Luden v. Justice* was decided under peculiar circumstances.

Rule absolute, without costs (b).

(a) 8 J. B. Moore, 346; S. C. 1 Bing. 344. also *Hall v. Barber*, *ante*, p. 8, and *Simon and Others v. Winnington*,

(b) See this case reported 5 M. & P. 603, and 7 Bing. 606. See *ante*, p. 16.

1831.

Monday,
June 6th.

BROUGH v. ADCOCK.

ON the 15th *January*, 1831, a commission of bankrupt was sued out against the plaintiff, under which he was duly declared a bankrupt. On the 9th of *February* following, the defendant signed judgment as in case of a nonsuit, and on the same day the costs were taxed. On the 20th of *April*, the plaintiff obtained his certificate, which was afterwards duly allowed. The defendant subsequently sued out a *ca. sa.* against the plaintiff, who paid the amount of the taxed costs into the hands of the Sheriff. A rule was obtained, requiring the defendant to shew cause why the sum so paid to the Sheriff should not be refunded to the plaintiff, on the ground that he was discharged by his certificate from payment of the costs; for, although the judgment was not signed until after the commission issued, yet, in law, it related back to the first day of the preceding (*Hilary*) Term, *vis.* the 11th of *January*. The costs, therefore, might have been proved under the commission. Cause was shewn against this rule.

Costs of a nonsuit are not a debt provable under a commission of bankrupt issued before signing judgment, although the judgment relates back to a time previous to the commission issuing.

Per Curiam.—The case of *Haswell v. Thorogood* (a) is precisely in point. There, a cause having been referred at *Nisi Prius* to an arbitrator, who found that a certain sum was due from the plaintiff to the defendant, and directed it to be paid to the latter; and between the time of making the order of reference and taxing costs and signing judgment of nonsuit, the plaintiff became bankrupt; it was held that the amount of the taxed costs did not constitute a debt provable under the commission, and that the bankrupt was not discharged, as to that debt, by his certificate: and Lord *Tenterden* said, “The costs of the cause did not constitute any debt, until judgment was

(a) 7 Barn. & Cress. 705.

1831.

BROUGH
v.
ADCOCK.

signed; for there is no distinction, in this respect, between a case where a defendant obtains a verdict, and one where the plaintiff is nonsuited. The verdict or nonsuit only entitles the defendant to tax his costs, but no debt arises, and no action can be maintained for them, until judgment is signed. The case of *Walker v. Barnes* (a) is a decisive authority to shew, that the amount of the costs could not be proved as a debt, under the plaintiff's commission; and if that be so, then he is liable to pay them." There, the plaintiff became bankrupt after nonsuit, but before judgment was signed. Here, the commission was sued out against the plaintiff on the 15th of *January*, and the judgment of nonsuit was not signed until the 9th of *February* following.

Rule discharged (b).

(a) 5 Taunt. 778.

5 Moore & Payne, 678; and 7

(b) This case is also reported in Bing. 650.

Thursday,
June 9th.

SPOONER v. MARY DANKS.

Plaintiff arrested defendant for 500*l*. Plea, coverture. Verdict for 38*l*., for money advanced since her husband's death. Defendant applied for costs under 43 *Geo.* 3, c. 46, s. 3:—*Held*, that, to obtain her costs, it must be shewn that the plaintiff knew of her coverture at the time of the arrest.

THE defendant was arrested by the plaintiff for 500*l*., money lent and advanced. By consent, bail to the amount of 250*l*. was taken. The defendant pleaded her coverture, and the verdict was for 38*l*., that being all which was proved to be due since her husband's decease. A rule was obtained to tax the defendant her costs, pursuant to the 43 *Geo.* 3, c. 46, s. 3, and cause was shewn against that rule.

Per Curiam.—We are of opinion, that this rule must be discharged. In order to entitle a defendant to costs within this statute, the obvious intention of the legislature was to throw the burthen of proving that the plaintiff had

no reasonable or probable cause for the arrest of the defendant. But, no proof is here given that the plaintiff had not reasonable and probable cause for arresting her for the 500*l*. Nothing is shewn to us, which can prove that the plaintiff was or might have been aware of her being a married woman at the time of the arrest. We are therefore of opinion that the defendant has not brought herself within the protection of the statute, and therefore, that she is not entitled to the relief afforded by it.

1831.
SPOONER
v.
DANKS.

Rule discharged (a).

(a) See this case also reported in 5 Moore & Payne, 701, and 7 Bing. 772.

LONERGAN v. The ROYAL EXCHANGE ASSURANCE COMPANY.

Monday,
June 13th.

IN this case, which had been referred to the Prothonotary to review his taxation (a), that officer refused to allow compensation for loss of time by an *American* captain, who had been brought from the *Havannah*, to be examined as a witness in this country. A rule for reviewing the Prothonotary's taxation having been obtained—

Reasonable allowance in costs may be made for the loss of time of a necessary foreign witness, who is not accessible to *subpoena*, and who will not attend without compensation.

Taddy, Serjt., and *Spankie*, Serjt., shewed cause, and cited *Moor v. Adams* (b), *Lowry v. Doubleday* (c), *Severn v. Olive* (d), *Lopes v. De Tastet* (e), *Tremaine v. Barrett* (f), *Tremaine v. Faith* (g), *Hagedorn v. Allnutt* (h), *Cotton v. Witt* (i), and *Sturdy v. Andrews* (k).

(a) See *ante*, 223.

(b) 5 Mu. & Selw. 156.

(c) *Ib.* 159, n.

(d) 6 J. B. Moore, 235.

(e) 7 J. B. Moore, 126.

(f) 6 Taunt. 88; S. C. 1 Marsh.

463.

(g) 6 Taunt. 92; S. C. 1 Marsh.

563.

(h) 3 Taunt. 379.

(i) 4 Taunt. 55.

(k) *Ib.* 697.

1831.
 LONERGAN
 v.
 ROYAL
 EXCHANGE
 ASSUR. CO.

Wilde, Serjt., supported the rule, and contended, that no general rule could be laid down as to the allowance of costs to witnesses coming from abroad for the express purpose of giving testimony in this country. If no compensation were made to a witness for his loss of time in a case like the present, he being a foreigner and master of a vessel, it would operate as a denial of justice; for, being without the jurisdiction of the Court, he could not be subpoenaed, and it was sworn that he refused to come over, until the plaintiff's agent undertook that he should be paid for his loss of time, and all other incidental expenses. He distinguished the cases cited on the other side from the present.

TINDAL, C. J.—We are not called upon to lay down a general rule, that, in all cases, where a party is obliged to have recourse to a foreign witness, he may, if he succeed, call on the adverse party to compensate the witness for his loss of time. Still less are we called upon to say, that, in any such case, the unsuccessful party is bound to pay a compensation to the full extent claimed by his adversary. It must be ascertained what is a reasonable sum for the unsuccessful party to pay. The question then is, whether, a foreigner, and captain of a vessel, on being required to come to this country to give evidence in a particular cause, and who refused to do so till the plaintiff's agent promised to compensate him for his loss of time and to pay all his expenses, such costs ought not to be paid by the defendants, who, without proceeding to trial, paid the plaintiffs the amount of their demand? I am of opinion that they ought. The case of *Severn v. Olive* is distinguishable; and although one of the witnesses came from *Scotland*, yet the claim made was not for mere loss of time, but for expenses incurred in making experiments to qualify himself as a witness in the particular cause in which his testimony was required. It has but lately been laid down

as a general principle, that, where witnesses attend under a *subpoena*, a compensation for loss of time is only allowed on taxation to attorneys and medical men; but I do not think that that principle is founded on a reasonable ground, or that, if it was to undergo revision, it would stand the test of examination; for I cannot see any true distinction to be drawn between persons in those professions, and surveyors or engineers, or other scientific men, who gain their livelihood by their own skill and exertions. But, that rule does not apply to the case of a foreigner, over whom the Court has no power or jurisdiction; and he may impose any reasonable terms on the party who requires his attendance, and may refuse to come to this country if the terms he proposes are not acceded to; and if the party or his agent agree to his proposals, I see no reason why they should not be enforced. I therefore think, that, under all the circumstances, this case should go back to the Prothonotary, and that he ought to allow a reasonable sum by way of compensation for the loss of time of the witness.

The other Judges concurred.

Rule absolute (a).

(a) This case is also reported in 5 M. & P. 805; and 7 Bing. 729.

END OF TRINITY TERM.

Michaelmas Term,

IN THE SECOND YEAR OF THE REIGN OF WILLIAM IV.

1831.

Thursday,
Nov. 3rd.

The affidavit of acknowledgment of a fine was taken in *Jamaica* on paper, and in the margin of the affidavit of the caption, it was certified that no parchment could be procured there; the Court permitted the fine to pass, on the officer's engrossing a copy of the affidavit on parchment, and annexing it to the paper writing.

KING, Plaintiff; GIBSON, FARMER, and Others, Deforciant.

WILDE, Serjt., moved that this fine might pass, notwithstanding the affidavit of acknowledgment which had been taken in *Jamaica*, was on paper, it being certified by one of the commissioners in the margin of the affidavit, that no parchment could be procured there. He cited *Palmer* plaintiff, *Morgan* and wife, deforciant (a), *Seton*, demandant, *Sinclair* and wife, deforciant (b); *Price*, demandant, *Williams*, tenant, Lord *Somers*, vouchee (c).

TINDAL, C. J.—It is merely for the sake of preservation that the Court requires all the documents relating to fines and recoveries to be engrossed or written on parchment. Therefore, let the Secondary make a copy of the affidavit of the acknowledgment on parchment, and annex it to the paper writing (d); and if we are satisfied,

(a) 4 J. B. Moore, 162; S. C. 1 B. & B. 472.

(b) 2 Sir W. Blac. 880.

(c) 4 Taunt. 573.

(d) But see *Randall*, plaintiff, *Lowring*, deforciant (6 J. B. Moore, 232), where the Court held, that the certificate of a notary, as well

as the affidavit of taking the acknowledgment of a fine in a foreign country, must be written on parchment; and that a literal ect. The Court, however, have translation of it, engrossed on parchment and referring to the original, would not supply the de-

(and here there can be no doubt), that this is an authentic document, the parties will be quite secure by having a copy engrossed on parchment, and annexed to the paper, with this order of the Court.

1831.
KING
v.
FARMER.

Fiat (a).

since acted upon the case in the text. In *Trinity* Term they allowed a fine, the acknowledgment of which had been taken on paper in the *Brazils*, to pass, on the production of an affidavit by some

person acquainted with the country, deposing that parchment cannot be procured there.

(c) This case is also reported in 1 Moore & Scott, 33, and 8 Bing. 4.

THORNTON v. HORNBY.

BY an order of *Nisi Prius*, this cause *and all matters in difference* between the parties were referred to the arbitration of a surveyor, the costs to abide the event of the award. In his award the arbitrator stated that he had investigated the accounts between the parties, and that the defendant had produced a rule of Court, by which it appeared that he had paid into Court a sum of 600*l.*; he thereupon awarded and determined that the defendant on the balance of accounts between him and the plaintiff had overpaid the plaintiff a sum of 34*l.*

Friday,
Nov. 4th.

Where an arbitrator finds by his award that, on the balance of accounts, the defendant has overpaid the plaintiff a certain sum, the Court will not grant an attachment against the plaintiff for the non-payment of that sum.

Jones, Serjt., shewed cause against a rule *nisi* obtained for an attachment against the plaintiff for the non-payment of the last-mentioned sum, pursuant to the award, and—

Andrews, Serjt., supported the rule.—He cited *Randall v. Randall* (a), and the *Highgate Archway Company v. Nash* (b).

Cur. adv. vult.

(a) 7 East, 81.

(b) 2 Barn. & Ald. 597.

1831.
 THORNTON
 v.
 HORNBY.

Per Curiam.—The Court think there is sufficient doubt upon the face of the award, to justify it in refusing an attachment, particularly as the defendant, if he chooses, has his remedy by action.

Rule discharged (a).

(a) This case is also reported in 1 Moore & Scott, 48; and 8 Bing. 13.

Friday,
 Nov. 4th.

HAMILTON, Demandant; FARRER, Tenant; WILSON,
 Vouchee.

A recovery may be amended by transposing the names of the demandant and tenant, although the deed to make a tenant to the *præcipe* was dated on the last day but one of the term in which the recovery was suffered.

RUSSELL, Serjt., moved to amend this recovery, which was suffered at bar, in *Michaelmas* Term, 1782, by transposing the names of the demandant and tenant pursuant to the deed to make a tenant to the *præcipe*, which was dated on the 27th November, 1782; and according to which, *Farrer* was to be the demandant, and *Hamilton*, tenant. It was also sworn, that it was the intention of the parties, that *Farrer* should be the demandant, and *Hamilton* the tenant; and that possession had gone according to the deed ever since. He cited *Lord*, demandant, *Biscoe*, tenant, *Ayles*, vouchee (a); *Roberts*, demandant, *Robinson*, tenant (b); *Loggin*, demandant, *Rawlins*, tenant, *Pullen* and Wife, vouchees (c); *Dowse*, demandant, *Lloyd*, tenant, *Reevor*, vouchee (d); *Milbanke* v. *Jolliffe* (e); *Rose*, demandant; *Frowd*, tenant.

Wilde, Serjt., shewed cause in the first instance for the

(a) Barnes, 24.
 (b) 2 Taunt. 222.
 (c) Barnes, 21.
 (d) 2 Bos. & Pul. 578. It is now settled that this Court has

no power to amend the writ of entry. The application for this purpose must be made to the Master of the Rolls.
 (e) 2 Bos. & Pul. 580.

son and heir of the vouchee.—He cited *Allen*, demandant, *Hexley*, tenant, *Massey*, vouchee (a); *Goodright* d. *Burton* v. *Rigby* (b).

1831.
HAMILTON
v.
WILSON.

TINDAL, C. J.—I think this amendment ought to be allowed, and that, by allowing it, we shall violate no general rule of law, whilst we shall carry into effect the obvious intention of the parties. There can be no doubt, that a recovery was intended to be suffered by the tenant in tail; and the *dramatis personæ* necessary to carry it into effect are admitted. The only question then is, whether the formal parts of the proceeding have been complied with, and are sufficient after fifty years' possession, in conformity with the deed. Can we, then, consistently with the intention of the parties, allow the names of the demandant and tenant to be transposed? The case of *Lord*, demandant, *Biscoe*, tenant, is an authority directly in point; there, the application for the amendment was opposed. Although it may be said, that, in that case, the deed to make the tenant to the *præcipe* was executed anterior to the recovery, so that there was something to amend by, and the deed here bears date on the 27th of *November*; and that, in contemplation of law, the recovery had relation to the first day of *Michaelmas* term, *viz.* the 6th of *November*; yet the deed might have been executed before the day of its date; and even if it had been executed on the 27th, there was only an interval of three weeks; and the statute 14 *Geo. 2*, c. 20, s. 6, enacts, that every recovery shall be deemed good and valid, provided the deed making the tenant to the *præcipe* appears to be executed before the end of the term in which such recovery was suffered. A deed, therefore, executed subsequently to the recovery, if in the same term, is put on the same footing as a deed executed before; and the clause in

(a) 6 J. B. Moore, 46.

(b) 2 Dow, 250.

1831.
 HAMILTON
 v.
 WILSON.

the act being remedial, must receive a liberal construction; and we are bound to give it full effect. Here, therefore, there is something virtually to amend by, and the mistake might be attributable to the misprision of the clerk. This case appears to me to fall within the principle laid down in *Loggin*, demandant, *Rawlins*, tenant, and I am glad that that case was referred to. There can be no doubt that justice will be answered by allowing the amendment prayed.

The rest of the Judges concurred (a).

(a) This case is also reported in 1 Moore & Scott, 43, and 8 Bing. 10.



Tuesday,
 Nov. 8th.

Where one of the commissioners for taking the caption of a fine in *Scotland*, was only an attorney of a *Scotch* Court, the fine was not allowed to pass.

ANONYMOUS.

WILDE, Serjt., moved that this fine might pass, although the caption, which had been taken in *Scotland*, was not taken before two advocates or clerks of the signet; one of the commissioners being an attorney of the Court of *Lanark*, and not an advocate or clerk to the signet.

Per Curiam.—By the words of the rule of *Michaelmas* Term, 39 *Geo.* 3 (a), no fine can pass where the caption is taken in this manner.

Application refused (b).

(a) 1 B. & P. 362.

(b) See this case also reported in 1 Moore & Scott, 54.

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BOOTY, Demandant; CAMERON, Tenant; NORTH & Wife,
JOHN CHALMERS, and A. M. CHALMERS, Vouchees.

Friday,
Nov. 11th.

TADDY, Serjt., moved that the recovery in this case might pass. The warrant of attorney of the vouchee, *John Chalmers*, was taken at *Jamaica*, before two commissioners, under a *dedimus potestatem*. The names of *North* and *Wife*, and *A. M. Chalmers*, did not appear in the warrant of attorney or *dedimus*, but that of *John Chalmers* alone, the three first-named vouchees having appeared at bar. He cited *Simmonds* and three others, vouchees (a), where the Court held, that, if one of several vouchees appeared personally at bar, and the others by attorney, the name of the former need not be inserted in the *dedimus* or warrant of attorney.

Where several vouchees appear personally at bar, and one by attorney, the names of the former need not be inserted in the *dedimus* or warrant of attorney.

TINDAL, C. J.—I think the more correct course would have been, to have inserted the names of all the vouchees in the *dedimus* and warrant of attorney; but, the case to which reference has been made is precisely in point.

The rest of the Court concurred.

Fiat (b).

(a) 11 J. B. Moore, 485.

(b) See this case also reported in 1 Moore & Scott, 57, and 8 Bing. 18.

MARKHAM, Plaintiff; BAYLEY, Deforciant.

Saturday
Nov. 12th.

SCRIVEN, Serjt., moved that this fine might pass. The acknowledgment had been taken in the *West Indies*, before two commissioners, under a *dedimus potestatem*. The *præcipe* and concord were signed by both the commissioners, who made the usual affidavit; but one omitted to in-

Where one of the commissioners had omitted to insert his name on the *dedimus*, the Court notwithstanding allowed the fine to pass.

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MARKHAM
Plaintiff;
BAYLEY,
Deforciant.

dorse his name on the *dedimus*. He cited *Graham*, plaintiff, —, deforciant (a), where the Court held, that, in taking the caption of a fine abroad, referring to the schedule on the back of the *dedimus*, such schedule must be signed by the commissioners; but, in this case, as one of the commissioners had indorsed his name on the *dedimus*, it was sufficient.

Fiat (b).

(a) 4 J. B. Moore, 295.

(b) See this case also reported in 1 Moore & Scott, 62; and 8 Bing. 18

Wednesday,
Nov. 16th.

SARAH BRIDGES, Widow, v. JANE SMYTH, Spinster.
SAME v. SAME.

The plaintiff obtained judgments against the defendant in two actions in this Court, and the defendant obtained a judgment against the plaintiff in the Court of *King's Bench*:—*Held*, that the defendant, upon acknowledging satisfaction for the amount of the judgments in this Court, on the judgment she had

obtained against the plaintiff in the Court of *King's Bench*, might enter satisfaction on the judgment rolls in the two actions in this Court, although the plaintiff had died, and more than two years had elapsed before judgment had been entered up against her in the Court of *King's Bench*, the verdict having been obtained in her lifetime, subject to a reference, and a rule *nisi* to reduce the damages awarded by the arbitrator being pending at the time of her death:—*Held*, also, that the judgment for the plaintiff in this Court might be set off against the judgment for the plaintiff in the Court of *King's Bench*, although the plaintiff's attorney had administered to her effects as a judgment creditor, and sued out a writ of *elegit* against the defendant, and commenced ejectments to enforce it:—*Held*, also, that the attorney had no *lien* for his costs upon the judgments in this Court; and he having refused to allow them to be set off against the judgment in the *King's Bench*, the Court ordered him to pay the costs of the application.

TINDAL, C. J.—This was an application by Miss *Smyth*, the defendant in two actions brought against her by the plaintiff in this Court, calling upon the attorney of the latter to shew cause why the defendant, upon acknowledging satisfaction for 816*l.* 15*s.* on a judgment for 3,052*l.* in the Court of *King's Bench*, should not be at liberty to enter satisfaction on the two judgment rolls in this Court; and why the plaintiff's attorney, who had administered to her effects, should not pay the costs of this application. After looking at the affidavits, and hearing the arguments in support of and against the rule, I am of opinion that it ought to be made absolute. The facts appear to be

these:—In *Trinity* Term, 1829, the plaintiff, Mrs. *Bridges*, obtained judgment against the defendant, Miss *Smyth*, in two actions in this Court; the one for money lent, amounting to 422*l.*, the other in replevin, in which the plaintiff recovered 394*l.* 15*s.*, both sums amounting to 816*l.* 15*s.* The plaintiff died in *April*, 1830, after the two judgments had been entered up in this Court, but two terms before a judgment had been entered up against her by the defendant in the action brought by the latter in the Court of *King's Bench*. It further appears, that the plaintiff's attorney administered to her effects, claiming to do so as a judgment creditor, to the amount of 500*l.*, on a *cognovit* given to him by the plaintiff, his client. The first question then is, whether, under these circumstances, the judgments entered up in this Court for the plaintiff, Mrs. *Bridges*, are properly the subject of set-off against the judgment obtained by the defendant against the plaintiff in the Court of *King's Bench*. Three objections have been urged against the set-off, and although it has not been insisted that a judgment obtained in this Court in a suit between the same parties, cannot be set off against a judgment obtained by one of such parties in the Court of *King's Bench*, yet, it is said that that rule cannot apply to this case, as the judgment in the Court of *King's Bench*, if not altogether void, is at least irregular, because it was not signed within two terms after the death of the plaintiff, Mrs. *Bridges*. But, it appears to me that the statute 17 *Car. 2*, c. 8, does not apply, as the verdict was obtained during the life of the plaintiff, and the amount of the damages was referred to an arbitrator, who also made his award in her lifetime. But, an application was made by her to the Court of *King's Bench*, to reduce the amount of the damages awarded, and the rule was pending during the time necessary for deciding other causes which had priority; and before cause could be shewn the plaintiff died. This case, therefore, is not go-

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verned by the terms of the statute 17 *Car.* 2, but rests on the rule established by the common law, that, where a party is entitled to judgment, and the cause is not decided, but delayed by the act of the Court, such party does not lose his right, nor are his representatives to suffer by his death in the mean time; for, eventually, judgment is entered *nunc pro tunc*, as if he were still alive: and here, though the judgment was entered up in *Trinity* Term, 1829, yet, as it was suffered to exist by the adverse party on the rolls of the Court, without any application to set it aside, we can only treat it as a valid and existing judgment; and if any application were made, it should have been to the Court of *King's Bench*, who had power to amend the proceedings, in order to obviate the alleged irregularity. But, it has been objected, *secondly*, that the plaintiff's attorney, as her administrator, has advanced a step further than the defendant, and got the advantage in his own hands, as he has prosecuted the judgment to execution; and therefore, that he is not in the same situation as the adverse party, and ought not now to be stopped. But the answer is, that he has obtained no real satisfaction; on the contrary, he has only caused a writ of *elegit* to be sued out, and commenced actions of ejectment, which are still pending in the Court of *King's Bench*; and the endeavouring to obtain satisfaction is no answer to an application of this description unless complete satisfaction has been obtained; for, in *Simpson v. Hanley* (a), the defendant was allowed to enter satisfaction on the roll upon a judgment obtained against him in the Court of *King's Bench*, on his acknowledging satisfaction for the amount upon a judgment obtained by him in this Court against the plaintiff for a larger amount, although he had the plaintiff in custody in execution on that judgment. The third objection is, that this is not a case between two parties representing each other in his own right, as the plain-

(a) 1 Mau. & Sel. 696.

tiff on one side and the defendant on the other; for, the plaintiff in one of the suits being dead, and administration being taken out to her estate and effects, the rights of creditors intervene, and the disposition of assets is thereby altered. But, the objection turns on a fallacy; for, what are the assets as between the plaintiff and defendant? If this were the case of a simple contract debt instead of a judgment, and the plaintiff owed the defendant 50*l.*, and the latter was indebted to the former in 40*l.*, the amount of the assets would be 10*l.*, that being the balance of account between them. So, if the sums were secured by bond, there would be no difficulty whatever; and the mere circumstance that the debts are secured by judgment, makes no difference, for the actual balance forms the assets; and in the case of *Barker v. Braham*, which was decided in 1773, a judgment in the Court of *King's Bench* was directed to be set off against a judgment in this Court; and the balance due to the plaintiff to be paid by the defendant, that being all that the creditors could claim. On the equitable principle, therefore, as well as on the rule of law that has so long and universally obtained, I am of opinion, that the set-off of the judgments in this Court, against that of the Court of *King's Bench*, ought to be allowed. It has been said, that the plaintiff's attorney had a *lien* for his costs upon the judgments in this Court, and that he would be deprived of such costs if the set-off were permitted; but it is well known that in this Court the attorney's *lien* is not regarded, as it has been held to be subject to the equitable claims that exist between the parties in the cause; and although the practice in the *King's Bench* differs in this respect, as that Court will not allow the debt and costs in one action to be set off against those in another, until the attorney's bill of costs is discharged, yet we must adhere to our own rules. Without, therefore, going into the merits of this case, or considering the conduct of the plaintiff's attorney; yet, as

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he was an officer of the Court, and bound to know the practice, and was applied to by the plaintiff to allow the set-off, but refused to do so, I think he ought to pay the costs of this application; and the Prothonotary, on looking at the affidavits, which are extremely long, will make such deductions as the justice of the case may require.

The rest of the Court concurred.

Rule absolute (a).

(a) This case is also reported *Braham*, 2 Sir W. Blac. 869; *S. C.* in 1 Moore & Scott, 93; and 8 3 Wils. 396; *Lomas v. Mellor*, 5 Bing. 29. See also *Peacock v. J. B. Moore*, 95; and 1 Reg. Gen. *Jeffrey*, 1 Taunt. 426; *Barker v. H. T. 2 Will. 4*, s. 93, *ante*, p. 196.

Wednesday,
 Nov. 16th.

The Mayor, Sheriffs, Citizens, and Commonalty of the City of NORWICH *v.* GILL and two Others.

Where the Sheriffs and Coroners are members of a corporate body, who sue in that character, the Court will direct the Prothonotary to name and appoint elisors, to whom the process may be directed; and the rule is absolute in the first instance.

TADDY, Serjt., applied for a rule *nisi* to refer it to the Prothonotary to elect and approve of two persons as elisors, to whom process might be directed between the above parties. The Sheriffs of *Norwich* were members of the corporation; the Coroners formed part of the commonalty; and the Mayor and Corporation were about to sue out *mesne* process against the defendants.

The Court acceded to the application, and ordered the rule to be made absolute in the first instance.

Rule absolute (a).

(a) The writ was issued in the usual way, but directed to "A. B. and C. D., elisors duly elected," instead of to the Sheriffs, and the words "in your bailiwick," altered to "in our city of *Norwich*, and county of the same city." See this case also reported in 1 M. & Scott, 91, and 8 Bing. 27. See also *The Mayor and Burgesses of the Town and Borough of Kingston-upon-Hull v. Rubb*, *ante*, p. 151.

1831.

Saturday,
Nov. 19th.

COOKE, Assignee of CLIFF, a Bankrupt v. JOHNSON.

IN this case a rule was obtained to set aside the notice of declaration and all subsequent proceedings for irregularity, with costs, the notice of declaration being in case, while the declaration, which was filed conditionally, was in *debt*. The declaration was taken off the file by the defendant's attorney, and an appearance entered, and no objection made to the irregularity, until four days afterwards, when the plaintiff demanded a plea.

Notice of declaration in case, where the declaration filed is in *debt*, is irregular.

Cross, Serjt., shewed cause, and cited *Cort v. Jacques* (a).

Wilde, Serjt., supported the rule, and cited *Gravis v. Wise* (b), and *Tidd's Prac.* (c).

Per Curiam.—The cause of action must in all cases be expressed in the notice of declaration. This is the more necessary where the declaration is filed conditionally. In *Cort v. Jacques* the objection was, that there was not sufficient precision in the notice. Here, the nature of the action is altogether misdescribed. The delay of four days was not so great as to destroy the defendant's right to take advantage of the irregularity.

Rule absolute (d).

(a) 8 T. R. 77.

(b) 2 Wils. 84.

(c) Vol. 1, p. 457, ed. 9.

(d) This case is also reported in 1 M. & Scott, 115. The omission of a date to the notice of declaration is no ground for setting aside the

proceedings for irregularity. *Anonymous*, 2 Chit. Rep. 238; *Hetherington v. Hobson*, 6 Taunt. 331. See also *Gilbert v. Kirkland*, ante, p. 153, and *post*; and 1 Reg. Gen. H. T. 2W.4, s. 33, ante, p. 187.

1831.

Tuesday,
Nov. 22nd

Sir HENRY DIGBY v. The Earl of STIRLING.

Where a defendant on three occasions voted in the character of a *Scotch* peer:—*Held*, that, after arrest, and giving a bail bond, he was entitled to have the bail bond delivered up to be cancelled.

THE defendant in this case had been arrested on a *capias ad respondendum*. A rule was obtained for delivering up the bail bond to be cancelled, on the ground that the defendant, at the time of his arrest, was a peer of *Scotland*, and therefore entitled to the privilege of freedom from arrest. The defendant had, on three several occasions, voted at the elections of *Scottish* representative peers.

Wilde, Serjt., shewed cause against the rule, and *Spankie*, Serjt., supported it.

TINDAL, C. J.—Without presuming to offer any opinion as to the validity of the title claimed by the defendant, it is sufficient to say, that we think him entitled to have the bail bond delivered up to be cancelled, as he has shewn that he has performed the only acts which, since the Union, he could perform as a peer of *Scotland*.

The rest of the Court concurred.

Rule absolute (a).

(a) This case is also reported in 1 Moore & Scott, 116, and 8 Bing. 55.

Tuesday,
Nov. 22nd.

WILSON and Another v. HAMER.

The defendant having been arrested, obtained his discharge by giving the plaintiff security for the debt.

The security proving very inadequate, the plaintiff, without restoring the security, arrested the defendant for the same cause. The bail bond was ordered to be delivered up to be cancelled, with costs, no fraud being imputed to the defendant.

THE defendant was arrested at the suit of the plaintiff, for a debt of 2000*l.*; he was then discharged, on giving the

plaintiff security for the debt and costs. The security, which was an assignment of a mortgage, was afterwards found to be worth only 400*l*. On reference to the Prothonotary, it was shewn to his satisfaction, that the defendant had been guilty of no fraud. Part of the debt, to the amount of 1000*l*., had been since paid off. The defendant was afterwards arrested a second time for the balance, the plaintiff still retaining the security. The defendant gave a bail bond. A rule for the delivery up of the bail bond was obtained; and—

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 WILSON
 v.
 HAMER.

Spankie, Serjt., shewed cause. He cited *Archer v Champneys* (a), and *Puckford v. Maxwell* (b).

Wilde, Serjt., supported the rule.

Per Curiam.—We think this rule should be made absolute. Where a party is twice arrested for the same cause of action, it is incumbent upon the plaintiff to shew a sufficient ground for the second arrest. It appears, that, upon the first arrest, an arrangement was entered into, and security given by the defendant to the plaintiffs. How far that security was available appears to have been a matter of doubt at the time. The plaintiffs, however, took the security, and still retain it. We therefore think, that the second arrest was not warranted by justice or good faith. Where the discharge from the first arrest has been procured by fraud, no doubt, on the authority of *Puckford v. Maxwell*, the defendant might be again arrested. But this was not the case here; for the plaintiffs still adhere to the security, and seek to make it available.

Rule absolute, with costs (c).

(a) 3 J. B. Moore, 607.

(b) 6 T. R. 52. See *Anonymous*, 1 Chit. Rep. 276.

(c) This case is also reported in

1 Moore & Scott, 120, and 8 Bing.

54. See 1 Reg. Gen. H. T. 2 W. 4, s. 7, *ante*, p. 181.

1831.

Wednesday,
Nov. 23rd.

The plaintiff sued out a *fi. fa.* against Lord *Egmont's* effects. Lord *E.* having previously assigned all his effects to trustees, for the benefit of his creditors, the Sheriff (under an indemnity from the trustees) returned *nulla bona*. The plaintiff sued the Sheriff for a false return. The Sheriff obtained a verdict. The Court refused to allow the plaintiff's judgment to be set off against the costs of the action against the Sheriff.

HEWITT v. PIGOTT, Esquire. SAME v. Lord EGMONT.

TINDAL, C. J.—In this case, the plaintiff recovered a judgment against Lord *Egmont*, for a debt of 2497*l.* 8*s.* 8*d.* Having sued out a writ of *fi. fa.* upon that judgment, against the effects of Lord *Egmont*, and delivered it to the Sheriff of *Somersetshire* to be executed, the latter found that the whole of Lord *Egmont's* property had, prior to the plaintiff's judgment, been assigned to trustees for the benefit of his Lordship's creditors. The Sheriff, having been indemnified by the trustees, returned *nulla bona*. The plaintiff then brought an action against the Sheriff for a false return; in which action the Sheriff eventually succeeded, and so became entitled to have execution for the costs. The question is, whether these costs are to be met by a set-off of the debt and costs due to the plaintiff, upon his judgment against Lord *Egmont*. Are the funds to be ultimately resorted to in the two actions substantially the same? If they are so, the plaintiff would undoubtedly not be liable to be called on to pay the costs. But, it is clear upon the facts, that the two funds are wholly distinct. In the one action, the Sheriff represents the trustees; the other action is inimical to their interests, as the plaintiff thereby seeks to obtain a priority, to the detriment of the general body of creditors. The actions cannot, therefore, be said to be between the same parties.

The rest of the Judges concurred.

Rule discharged (a).

(a) This case is also reported in 1 Moore & Scott, 122, and 8 Bing. 61.

1831.

Friday,
Nov. 25th.

ELWOOD v. PEARCE.

IN this case, the bill of the plaintiff's attorney amounted to 18*l.* 14*s.* 8*d.* The Prothonotary, having struck out items to the amount of 24*l.* 14*s.* 8*d.*, refused to allow the attorney the costs of the taxation. A rule *nisi* was obtained on behalf of the attorney, to direct the Prothonotary to allow such costs.

Where an attorney's bill had been reduced nearly one sixth on taxation, the Court refused to allow him the costs of taxation.

Andrews, Serjt., shewed cause, and cited *Whitfield v. James* (a).

Wilde, Serjt., supported the rule, and cited *Higgins v. Woolcott* (b), and *Barker v. The Bishop of London* (c).

TINDAL, C. J.—The stat. (2 *Geo.* 2, c. 23, s. 23) directs, that if, upon taxation, more than one sixth part of an attorney's bill be deducted, the attorney shall pay the costs of taxation; but that, if less than one sixth be deducted, the Court may, in their discretion, charge the client. No general rule has been laid down upon the subject; but, I think this is a case in which the Court may exercise a discretion. The amount deducted being so nearly a sixth, we ought not to be called upon by an officer of the Court to allow his costs of taxation. If about 5*l.* more had been taken off by the Prothonotary, the attorney would have had to pay the costs.

The rest of the Court concurred.

Rule discharged (d).

- (a) 8 J. B. Moore, 40; S. C. 1 589.
 Bing. 207. (c) Barnes, 147.
 (b) 5 B. & C. 760; S. C. *nom.* (d) This case is also reported in
Dickens v. Woolcott, 8 D. & R. 1 M. & Scott, 159, and 8 Bing. 83.

END OF MICHAELMAS TERM.

Hilary Term,

IN THE SECOND YEAR OF THE REIGN OF WILLIAM IV.

1832.

Thursday,
Jan. 12th.

PIRIE v. IRON.

In certain cases, the Court will grant a rule absolute, unless cause be shewn on the morrow for the examination of witnesses by the Prothonotary, under the 1 *Will.* 4, c. 22, s. 4.

SPANKIE, Serjt., moved, on the part of the plaintiff, that the examinations of certain witnesses in this cause might be taken *vidæ voce* before the Prothonotary, under the provisions of the 1 *Will.* 4, c. 22, s. 4. The action was brought against the defendant, who was a pilot, for running down a vessel belonging to the plaintiff; and the master and mate of the plaintiff's vessel, the witnesses proposed to be examined, were going to sail for *India* on *Saturday* the 14th of *January*.

Per Curiam.—Take the rule absolute, unless cause be shewn to-morrow (a).

(a) This case is also reported in 1 Moore & Scott, 223, and 8 Bing. 143. See 2 Dowl. Stat. 4.

Friday,
Jan. 13th.

MEREDITH v. DREW.

The Court will not enter into the question of the defendant's liability to pay costs, under the *Bath* Court of Requests act, before verdict.

BY the *Bath* Court of Requests act, 45 *Geo.* 3, c. lxxvii. s. 22, it is provided, that if any action for any debt (to the amount of 10*l.*) recoverable in the said Court, shall be commenced in any other Court, the plaintiff shall not, by reason of a verdict for him, or otherwise, be entitled to any costs.

Merewether, Serjt., on the part of the defendant, moved for a rule to call upon the plaintiff to shew cause why the proceedings in this cause should not be stayed, upon payment of the debt, without costs, upon an affidavit, stating that the action was brought to recover a debt of 7*l.*, and that the defendant was liable to be sued in the *Bath* Court of Requests; and therefore the plaintiff could recover no costs. The cause had not yet been tried. He cited *Demester v. Day* (a), *Baildon v. Potter* (b), and *Axon v. Dallimore* (c).

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Per Curiam.—We think the defendant in this case is not in the same stage of proceeding as is contemplated by the statute, or as the parties were, in the cases cited. The statute only applies to a case where there has been a verdict; here, the case has not proceeded so far, and therefore the motion is premature. As the defendant applies to the Court for a favour which he is not entitled to receive, he ought to pay the costs of the application.

Rule refused (d).

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| (a) 8 East, 239. | 1 M. & Scott, 225, and 8 Bing. 141. |
| (b) 3 B. & Ald. 210; S. C. 1 Chit. Rep. 635. | See <i>Baildon v. Pitter</i> , 3 B. & Ald. 210; and <i>Graham v. Browne</i> , 2 C. & J. 327; and <i>post</i> . |
| (c) 3 D. & R. 51. | |
| (d) This case is also reported in | |

MACARTHY v. SMITH.

Saturday,
 Jan. 14th.

IN an action of *assumpsit*, the declaration consisted of counts for goods sold and delivered, and the common money counts. The bill of particulars, which was annexed to the record pursuant to 6 Reg. Gen. T. T. 1 *Will.* 4(a), only mentioned goods sold and delivered. At the

The rule of T. T. 1 *Will.* 4, requiring the particular of the demand to be annexed to the record, dispenses with the proof of its delivery.

(a) *Ante*, p. 103.

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 {
 MACARTHY
 v.
 SMITH.

trial, the defence was, that the goods were delivered upon condition of sale or return; but it appeared that part of the goods, to the amount of 3*l.* 18*s.*, had been sold by the defendant. An objection was taken, on the part of the defendant, that, the bill of particulars not mentioning a demand for money had and received, the plaintiff could not be entitled to a verdict on the money counts. On the part of the plaintiff it was contended, that, the bill of particulars not being proved, it could not furnish an objection to the plaintiff's claim. The Lord Chief Justice, before whom the cause was tried, held that the annexation of the particulars to the record, in pursuance of the rule, dispensed with the necessity of proving it, and accordingly nonsuited the plaintiff.

On an application to set aside this nonsuit, the ruling of the Chief Justice was confirmed (*a*).

(*a*) This case is also reported in 1 Moore & Scott, 227, and 8 Bing. 145.

Tuesday,
 Jan. 17*th*.

ACRAMAN and Another v. HARRISON.

A motion to bring up a prisoner, under the compulsory clauses of the Lords' act, cannot be granted so late as the seventh day "of the term, &c."

MEREWETHER, Serjt., moved that the defendant, a prisoner in the *Fleet* prison, might be brought up under the compulsory clause of the Lords' act, 32 *Geo.* 2, c. 28, s. 16.

Per Curiam.—The statute enacts, that a prisoner refusing to deliver up his estate and effects to satisfy his creditors, the creditors may, on giving him twenty days' notice of such intention, compel such prisoner to be brought up, and to deliver into Court a schedule of his estate and effects, and the incumbrances affecting the same, upon oath, "within the first seven days of the term which shall next ensue at the expiration of the said twenty days." This

being the seventh day of the term, and it being impossible to bring up the prisoner before the rising of the Court, the application must be refused. The case of *Langdon v. Rossiter* (a) is in point. There the Court held, that if a prisoner be brought up by a rule of Court under the compulsory clauses of the Lords' act, on a day after the first seven days of the term next ensuing the expiration of the twenty days' notice required by that act, he cannot be called upon to give in an account of his estate upon oath.

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ACRAMAN
v.
HARRISON.

Rule refused (b).

(a) *McClel.* 6; *S. C.* 13 *Price*, 1 *Moore & Scott*, 240; and 8 *Bing.* 154.

(b) This case is also reported in

ANONYMOUS.

Tuesday,
Jan. 17th.

TADDY, Serjt., moved, that a fine levied in *Trinity* Term last might be amended, by adding a parish not named in the deed to lead the uses. The lands were described as being in the parish of *Bexley*, in the county of *Kent*; but there was one piece of meadow or pasture described by its abutments and occupation, which it had since been discovered was in the adjoining parish of *Eltham*. He cited the case of *Lambe v. Reaston* (a), where a fine was amended by inserting a parish not named in the deed to lead the uses, it being certain, by the deed specifying the quantities and occupiers, that the land was intended to pass.

The Court allowed a fine to be amended, by inserting land in a parish not named in the deed, it appearing from the description of the property in the deed, that it was the intention of the parties to pass such land, and it being necessary to make up the quantities stated therein.

Per Curiam.—As the land is specifically described in the deed, and the quantity therein mentioned cannot be

(a) 5 *Taunt.* 207.

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made up without that situate in the parish which it is proposed to add, we think the amendment should be allowed.

Fiat (a).

(a) This case is also reported in 1 Moore & Scott, 293.

Saturday,
Jan. 21st.

PALMER v. MARSHALL.

Where a new trial is directed in an action on a policy of insurance, the Court will not change the venue from *Dorsetshire* to *London*, on the ground that the plaintiff and defendant resided in *London*, and all the witnesses on the first trial were taken down from *London*.

THIS was an action on a policy of insurance upon the yacht *Ruby*, at and from *Bristol* to *London*, which was lost upon the voyage. A verdict was found for the plaintiff, and afterwards a new trial granted. A rule was subsequently obtained for changing the venue from *Dorsetshire* to *London*, on the ground, that both parties resided in *London*, and that all the witnesses upon the first trial were taken down from *London*. Cause was shewn against this rule.

Per Curiam.—No sufficient reason has been adduced to warrant the Court in granting this application. The plaintiff might lay the venue where he pleased. The motion to change it should not have been made in so late a stage of the cause. If the venue were now to be changed to *London*, the plaintiff would lose the opportunity of trying his cause at the next assizes.

Rule discharged (a).

(a) This case is also reported in 1 Moore & Scott, 252; and 8 Bing. 155.

1832.

Monday,
Jan. 23rd.

SELBY v. HILLS.

THE defendant in this case caused a commission of bankrupt to be issued against a person named *Prigott*, and afterwards attended at *Basinghall Street*, for the purpose of proposing himself as an assignee, and of watching the proceedings under the commission. When the business of the day was concluded, he set off upon his return to *Bexley* in *Kent*, where he resided. As soon as he had crossed *London-bridge*, he was arrested at the suit of the plaintiff. He gave bail, and afterwards rendered in discharge of them. A rule *nisi* was granted for discharging him out of custody.

A petitioning creditor attending the commissioners for the purpose of watching the progress of the commission, and of proposing himself as an assignee, is protected from arrest *sando, morando, et redeundo*: and it is for the party who seeks to oust him of his privilege, to shew an unreasonable delay or an improper deviation from his course home.

Jones, Serjt., shewed cause, and produced an affidavit, alleging, that the arrest had been made two hours after the defendant had left the Court in *Basinghall Street*, and that he had in the mean time made several calls, both in the city, and at *Westminster*. He cited *Kinder v. Williams* (a); and *Ex parte List* (b).

Goulburn, Serjt., supported the rule.—He cited *Wiltingham v. Matthews* (c); *Lightfoot v. Cameron* (d); and *Spence v. Stuart* (e).

TINDAL, C. J.—This rule must be made absolute. I think the petitioning creditor attending the commissioners, at the opening of a commission of bankrupt, falls within the cases which have decided, that parties are exempted from arrest whilst going to or returning from Courts of justice. The petitioning creditor has as much interest in attending before the commissioners of bankrupt, as an opposing creditor has in giving his attendance at the In-

(a) 4 T. R. 377.

(d) 2 Sir W. Blac. 1113.

(b) Madd. 49; 2 Rose, 24.

(e) 3 East, 89.

(c) 2 Marsh. 58.

1832.

SELBY

v.

HILLIS.

solvent Debtors' Court. The case of *Willingham v. Matthews* is in point. It was there held, that a person attending the Insolvent Debtors' Court, for the purpose of opposing the discharge of a debtor, is privileged from arrest, in the same manner as when in attendance upon any other Court. I also think, that the application to discharge the defendant was properly made to this Court, inasmuch as the process issued out of this Court; and we are bound to see that it is not improperly put in force (a).

The only question to be considered is, whether the defendant was honestly using his privilege, or whether he only sets it up as a pretence to defeat a creditor? The rule is not to be scanned with too strict an eye; every reasonable intendment is to be made in favour of a party claiming exemption under it. The affidavit on the part of the plaintiff is not so precise and satisfactory as to convince me, that the defendant was abusing the privilege. He was arrested while on his progress towards home, in a line from the Court of Commissioners to *Bexley*, where he resided. The *onus*, therefore, lay on the plaintiff to shew, that the defendant was unduly availing himself of the privilege, and out of his proper course. The affidavit states, that the arrest was made two hours after the defendant left the Court, and that he had called in the mean time at several places out of his way; but the deponent does not state this of his own knowledge, he only states that he had heard it. The two hours might have been devoted to refreshment; and there is nothing inconsistent with what is sworn in supposing that the calls alleged to have been made by the defendant were made on his way to the Court.

The rest of the Judges concurred.

Rule absolute, without costs (b).

(a) See *Walker v. Webb*, 3 Anst. 941; *Ricketts v. Gurney*, 1 Chit. Rep. 682; *S. C.* 7 Price, 699.

(b) This case is also reported in 1 Moore & Scott, 253; and 8 Bing. 166. See *Anon. ante*, p. 157.

1832.

Tuesday,
Jan. 24th.

SUTTON v. CLARKE.

IN this case the defendant was arrested for 101*l*. He afterwards took out a summons for particulars of the plaintiff's demand. They were delivered, but were too general. A summons for better particulars was obtained, and a peremptory order made, requiring the plaintiff to deliver further and better particulars within one week. This order not having been complied with, the defendant's attorney signed judgment of *non pros*.

A judgment of *non pros*. signed by the defendant for the non-delivery of particulars pursuant to a Judge's order is irregular.

TINDAL, C. J.—I think the judgment signed in this case must be set aside, for it has been signed prematurely. The neglect of the plaintiff to comply with the order would only operate as a stay of proceeding.

The rest of the Court concurred.

Rule absolute, with costs (a).

(a) See this case reported in 1 M. & Scott, 271. See *Burgess v. Swaine*, 7 B. & C. 485. The decision in that case was, that a defendant cannot sign judgment of *non pros*. for not declaring after an order for particulars of the plaintiff's demand, with a stay of proceedings till they are delivered, unless the order requires that they shall be delivered within a

certain time. In *Somers v. King*, 7 Dow. & Ryl. 125, a plaintiff omitted to deliver a particular of his demand in obedience to a Judge's order, the Court refused to allow the defendant to sign judgment of *non pros*. See 6 Reg. Gen. T. T. 1 Will. 4, *ante*, p. 103, and 1 Reg. Gen. H. T. 2 Will. 4, ss. 47 and 48, p. 189.

ANONYMOUS.

Tuesday,
Jan. 24th.

BOMPAS, Serjt., opposed the justification of bail, in a country cause, on the ground that the notice did not, in

Rule 2 of T. T. 1 Will. 4, as to notice of bail, applies to both town and country bail.

1832.

ANONYMOUS.

conformity with 2 Reg. Gen. T. T. 1 *Will.* 4 (a), state the residence of the proposed bail during the previous six months.

Andrews, Serjt., in support of the bail, contended that the rule did not apply to country bail.

Per Curiam.—The first rule of T. T. 1 *Will.* 4, expressly mentions both town and country causes. The second rule of that term speaks of bail generally. That must apply to every bail. The notice is not sufficient.

Bail rejected (b).

(a) *Ante*, p. 103.

(b) This case is also reported in 1 Moore & Scott, 296.



Friday,
Jan. 27th.

EVANS v. JAMES, a Prisoner.

Where a prisoner has petitioned for his discharge under the Insolvent Act, and the Insolvent Court has not decided on the merits of his petition, the Court will not compel him to assign under the compulsory clauses of the Lords' Act.

THE defendant, in this case, had been brought up under the compulsory clauses of the Lords' Act. He had claimed his sixty days; and on again appearing before the Court, he alleged that he had filed a petition in the Insolvent Debtors' Court upon which he had not yet been heard. He was remanded for a week, and on again appearing before the Court, he produced an affidavit, stating, that his petition had been dismissed by the Insolvent Court on the ground of an informality, but that that Court had on the day before granted him a rule for rehearing.

Per Curiam.—It appears that the prisoner's petition, filed in the Insolvent Debtors' Court, has been dismissed for informality only, and that he has obtained a new rule in that Court. It is true, that the jurisdiction of this Court is not impaired or impeded by the proceedings in the other

Court; but this is an application to our discretion, and we must do that which seems to us the most consonant to justice. If the insolvent is honestly proceeding to do that which will obtain for his creditors a fair distribution of his property, we ought not to be called upon to interfere.

1832.

EVANS
v.
JAMES.

Remanded (a).

(a) This case is also reported in 1 M. & Scott, 309. The 11 Geo. 4 & 1 Will. 4, c. 38, s. 10, suspends the operation of the Lords' Act, so far as persons petitioning for their discharge are concerned, for two years, and thence to the end of the then next Session of Parlia-

ment. (See 1 Dowl. Stat. 200). That act is continued by the 2 & 3 Will. 4, c. 44, s. 5, until the 1st June, 1835, and thence until the end of the then next Session of Parliament. (See 3 Dowl. Stat. 190).

LEWIS v. KNIGHT.

IN this case the defendant, who was a *feme covert*, was arrested at the suit of the plaintiff. He was at the time aware of her coverture. Her attorney gave the Sheriff an undertaking to put in bail.

Monday,
Jan. 30th.

An undertaking by an attorney, to give a bail bond to the Sheriff, is contrary to the 23 H. 6, c. 10, and therefore void.

Merewether, Serjt., obtained a rule to cancel the undertaking, and stay proceedings, on the defendant's entering a common appearance, as the plaintiff was aware of the coverture at the time of the arrest.

Wilde, Serjt., shewed cause, contending that the undertaking was void, and cited *Sedgworth v. Spicer* (a), *Fuller v. Prest* (b), and *Parker v. England* (c).

Per Curiam.—The undertaking of the attorney is illegal and void. The defendant has given no bail bond. She

(a) 4 East, 568; S. C. 2 Smith, 305.

(b) 7 T. R. 109.
(c) 2 Smith, 52.

1832.

LEWIS
v.
KNIGHT.

has never been brought into Court. How then are we to enter an appearance for her? The rule must be discharged, with costs.

Rule discharged, with costs (a).

(a) This case is also reported in 1 M. & Scott, 353, and 8 Bing. 271. See *Rogers v. Reeves*, where it was held, that an undertaking of an attorney, given to the plaintiff

in order to procure the discharge of the defendant, to put in bail, or to pay the debt, is not within the stat. 23 Hen. 6, c. 10, not being given to the Sheriff.

Monday,
Jan. 30th.

MOUNT v. LARKINS.

What allowance on taxation shall be made for the subsistence of the master of a vessel, from the time of his subpoena till the trial, in an action on a policy of insurance, and afterwards, while a rule is pending for a new trial, is, in general, a matter in the discretion of the Prothonotary.

ON taxation of the defendant's costs, on a policy of insurance, the Prothonotary allowed for the subsistence of the master of the vessel from the time he was subpoenaed till the trial; but refused to allow for his further detention pending a rule for a new trial, upon a point to which his evidence was not applicable. The witness was a master in the Royal Navy on half pay, and was not examined on the trial. A rule to review the Prothonotary's taxation was obtained, and cause shewn against it.

TINDAL, C. J.—It appears to me, that no ground has been shewn for sending this matter back to the Prothonotary. With respect to the motion for reducing the allowance made to the witness, he might have been a material witness for the defendant, and therefore might reasonably be held in attendance. We must not speculate too nicely in these cases, as to the necessity of securing witnesses; and the Prothonotary is to exercise his discretion as to the amount of the allowance. The Court of *King's Bench*, in the case of *Berry v. Pratt* (a), confirm-

(a) 1 B. & C. 276; *S. C. Anonymous*, 2 D. & R. 424.

ed the Master's allowance of subsistence to a common mariner, who was residing in this country, but, in consequence of his detention for the purpose of the trial, had lost an opportunity of going abroad. The fact of the witness in this case being a master in the navy, makes no difference; he might still be employed in the merchant service. I, therefore, think there is no ground for saying, that the sum allowed was too large; neither do I think that the sum ought to be increased. It has been contended on the part of the defendant, that it was no more than a necessary and reasonable precaution on his part to detain the witness, until the trial that was pending was disposed of; but, at a very early stage of the proceedings, it was intimated to the parties that the new trial, if granted, would be confined to the question of sea-worthiness; and this witness was merely proposed to be called to negative the alleged barratry, and to explain the delay which had taken place in the course of the voyage out. Upon the whole, I think the Prothonotary has exercised a proper discretion, and that there is no ground for calling upon him to review his taxation.

1832.
MOUNT
v.
LARKINS.

The rest of the Court concurred.

Rule discharged (a).

(a) This case is also reported in *Exchange Assurance Company, ante*,
1 M. & Scott, 357, and 8 Bing. 195. p. 233; S. C. 5 M. & P. 805, and
See also *Loneragan v. The Royal* 7 Bing. 725:

HOWELL v. POWLETT.

Monday,
Jan. 36th.

ISSUE was joined in this case in *Michaelmas* Term, and the plaintiff gave notice of trial for the sittings after that Where a plaintiff gives notice of trial sooner than he need, he is bound to proceed to trial pursuant to the notice, or the defendant may move for judgment as in case of a nonsuit in the following term.

1832.
 HOWELL
 v.
 POWLETT.

Term; but did not proceed to trial. A rule for judgment as in case of a nonsuit was obtained, and—

Wilde, Serjt., shewed cause. He cited *Da Costa v. Ledstone* (a).

Andrews, Serjt., supported the rule, and cited *Hay v. Howell* (b).

Per Curiam.—When the plaintiff gives notice of trial, he is bound to proceed according to the notice; and, on his default, the defendant is entitled to move for judgment as in case of a nonsuit. The plaintiff has chosen to expedite the cause, by giving notice of trial in *Michaelmas* Term, when he was not obliged so to do, and he cannot be allowed to recede.

Rule discharged, on a peremptory undertaking to try at the next sittings (c).

(a) 2 Hen. Blac. 558.

(b) 2 N. R. 397.

(c) This case is also reported in 1 M. & Scott, 355, and 8 Bing. 272. See *Munt v. Tremamondo*, 4 T. R. 557, where it was held, that if issue in a *London* cause be joined early enough in a term to enable

the plaintiff to give notice of trial for the sittings after that term, the defendant is not entitled to judgment as in case of a nonsuit for not proceeding to trial, unless the plaintiff has in fact given notice of trial. See 1 Reg. Gen. 2 Will. 4, s. 62, *ante*, p. 191.

Tuesday,
 Jan. 31st.

AUGUSTUS NEWTON v. CAMILLA NEWTON.

THIS was an action on the case for a libel. On the trial of *Nisi Prius*, a verdict is entered in favour of the plaintiff for nominal damages, and the costs of the action, and the plaintiff is to pay the defendant a certain sum, that sum may be set off against the costs in the cause.

respect to which there was a dispute between the parties *dehors* the action, should be paid by him to the defendant. An order of *Nisi Prius* to that effect was drawn up, the plaintiff's costs were taxed at 80*l.*, and 10*l.* was tendered by the defendant to the plaintiff as the difference between the 70*l.* due *by* him, and the 80*l.* due *to* him. A rule having been obtained requiring the plaintiff to shew cause why the above sum of 70*l.* should not be set off against the plaintiff's costs—

1832.
NEWTON
v.
NEWTON.

Wilde, Serjt., shewed cause, and cited *Philipson v. Caldwell* (a).

Merewether, Serjt., supported the rule.

Per Curiam.—The parties in this case agreed to enter into a rule of Court, by which the plaintiff was to have a verdict, and the costs of the action, and the defendant was to receive 70*l.* The Court is called upon to supply that which is mere matter of form, *vis.* the mode of enforcing obedience to the order. We see no reason why the two claims should not be set off against each other.

Rule absolute (b).

(a) 6 Taunt. 176.

1 Moore & Scott, 366, and 8 Bing.

(b) This case is also reported in 202.

CANTWELL v. The Earl of STIRLING.

IN this case, the declaration, which was in *assumpsit* on a bill of exchange, was of *Michaelmas* Term, 2 Will. 4. The defendant pleaded in abatement, on the 8th of *November*. To this plea the plaintiff demurred, and the defendant joined in demurrer. After argument on the 25th

Tuesday,
Jan. 31st.

After a judgment of *respondent oster*, a defendant is entitled to four days' time for pleading.

1832.
 CANTWELL
 v.
 STIRLING.

of *January*, the Court pronounced judgment of *respondeat oster*. No terms of pleading were imposed upon the defendant; but, on the 27th, he pleaded *non assumpsit*. On the same day, the plaintiff signed judgment for want of a plea, and at the same time took out a rule to compute principal and interest. After cause had been shewn against a rule for setting aside this judgment—

Per Curiam.—The judgment is clearly irregular. The defendant was entitled to four days' time to plead.

Rule absolute, without costs (a).

(a) This case is also reported in 1 Moore & Scott, 365, and 8 Bing. 177.

Tuesday,
 Jan. 31st.

ABRAHAM v. NORTON.

Before the Court will permit a witness to be examined before the Prothonotary, under the 1 Will. 4, c. 22, s. 4, on the ground of anticipated illness, it must appear, that there is strong reason to believe that the illness will exist at the time of the trial.

A RULE in this case was obtained on the part of the plaintiff, for examining a witness before the Prothonotary, under the provisions of the 1 Will. 4, c. 22, s. 4 (a). The affidavit upon which the motion was founded, stated, that the cause was ready for trial at the Sittings after *Hilary* Term, and that the husband of the witness in question, who was material and necessary for the plaintiff, had informed the deponent that his wife was pregnant, and likely to be confined in the month of *February* or *March*.

Bompas, Serjt. shewed cause.

Wilde, Serjt., supported the rule.

TINDAL, C. J.—It may be doubted, whether the infirmity of this witness is of such a nature as to be within

(a) See 2 Dowl. Stat. 43, n. (d).

the contemplation of the statute, as it is only temporary. It is not, however, necessary at present to lay down any general rule upon the subject, for the affidavit in support of the motion is not sufficiently explicit. It should at least appear to the Court, by the affidavits of persons of competent skill, that the confinement of the party is likely to take place before the time of the trial, or so near thereto, as to render the attendance of the witness a matter of difficulty and danger.

The rest of the Court concurred.

Rule discharged (*a*).

(*a*) This case is also reported in 1 Moore & Scott, 384, and 8 Bing. 274.

1832.

ABRAHAM
v.
NORTON.

Easter Term.

IN THE SECOND YEAR OF THE REIGN OF WILLIAM IV.

HUTCHINSON v. BLACKWELL.

TADDY, Serjt., on a former day in this term, obtained a rule *nisi* to enter up judgment pursuant to an award, or that the plea might be withdrawn and a *cognovit* entered for the amount of the damages. The action was commenced in this Court, and issue joined, the record passed, and jury process awarded and returned, but the cause had not been entered for trial; when the parties entered into an agreement to leave the cause, and the subject-matter thereof, and *the issue therein*, and the costs of such action, to the arbitrament, final end, and determination of a barrister, and to abide by and perform such award, order, and determination as the said arbitrator

Friday,
April 27th.

A submission to refer a cause, and the subject-matter thereof, and the *issue therein*, to the award of a barrister, does not authorize him to order a verdict to be entered up.

1832.
HUTCHINSON
v.
BLACKWELL.

should make of and concerning the matters, disputes, and differences subsisting between them as thereinbefore mentioned; that the costs of the reference, award, and action should be in his discretion; and that the submission should be made a rule of the Court of *King's Bench*. The submission had been made a rule of the Court of *King's Bench*; and the arbitrator had ordered that a verdict should be entered for the plaintiff for 204*l.* 10*s.*, and that the costs of the cause should be paid by the defendant.

Wilde, Serjt., *contra*, contended that the Court had no authority to order a verdict to be entered; nor was any power given to the arbitrator to order a verdict to be entered.

Taddy, Serjt., in support of his rule, submitted that the agreement substantially gave the arbitrator authority to enter up the verdict.

TINDAL, C. J.—Looking at the terms of the submission, I think we have no authority to do that which is required by the plaintiff. In ordinary cases, provision is made that the arbitrator shall be at liberty to enter up a verdict. and that no writ of error shall be brought thereon. The omission of that provision in the present case seems to shew that it was not the intention of the parties to give the arbitrator power to order a verdict to be entered, but that they meant to rely on an attachment to enforce the performance of the award.

The rest of the Court concurring—

Rule discharged.

1832.

HIND, Demandant; RADDEN, Tenant; HAWKINS,
Vouchee.

Friday,
April 27th.

SPANKIE, Serjt., moved that a recovery, which was suffered by Sir *Christopher Hawkins*, in *Trinity Term*, 1780, might be amended, to make it conformable with the deed to lead the uses. The deed comprised several estates, and, among others, three fifths of *five* messuages (particularly described) in the parish of *St. Dennis*, in the county of *Cornwall*. The recovery only mentioned three fifths of *one* messuage. The affidavits upon which the motion was founded, stated distinctly, that the possession had gone ever since the recovery was suffered agreeably to the amendment prayed, and that the misdescription was merely accidental.

The Court allowed a recovery suffered in 1780, to be amended by the insertion of three fifths of *five* messuages instead of *one*, to make it conform with the deed.

Per Curiam.

Fiat.

DOE *d.* HOPE *v.* CARTER.

Friday,
April 27th.

THIS was an action of ejectment. The trial had been postponed at the instance of the defendant, on the terms of his paying the costs of the day. These costs had never been demanded.

Interlocutory costs may be set off against final costs, subject to the attorney's lien.

Wilde, Serjt., on the part of the defendant, obtained a rule *nisi*, that the above-mentioned costs might be set off against the general costs in the cause, or the proceedings stayed.

Andrews, Serjt., now shewed cause, upon an affidavit of the plaintiff's attorney, who claimed a *lien* for his costs, stating that he should be a loser by his client if the set-off

1832.

DOE
d.
HOPE
v.
CARTER.

were allowed. He cited *Aspinall v. Stamp* (a), and contended, that, inasmuch as the plaintiff might have insisted upon payment of the costs of the day before the defendant could be permitted to go to trial, he ought not to be prejudiced by his omission to do so.

Wilde, Serjt., in support of his rule.—In this Court the attorney's *lien* is subject to the equities between the parties. In *Emerson v. Lashley* (b), the Court ordered the costs awarded to the plaintiff in an action in the Lord Mayor's Court, to be deducted by the Prothonotary from the costs allowed to the defendant in an action here.

TINDAL, C. J.—The payment of the interlocutory costs by the defendant, certainly, was not a condition precedent to his right to proceed to trial, but it was a bargain between the parties, by which the defendant has obtained an advantage. The plaintiff might, had he proceeded strictly and moved for an attachment, have obtained his costs at the time. I think, therefore, that, on its being made out to the satisfaction of the Prothonotary, that something is due to the attorney for the costs in this cause, the rule should be made absolute, subject to his *lien*.

Rule absolute accordingly (c).

(a) 4 Dow. & Ryl. 716; S. C.
3 Barn. & Cress. 108.
(b) 2 H. Blac. 248.

(c) See 1 Reg. Gen. H. T. 2
Will. 4, s. 93, *ante*, p. 196.

1832.

BELL and Another, Assignees of the Sheriff of MIDDLESEX, v. FOSTER and Others.

Friday,
April 27th.

WILDE, Serjt., on a former day in this term, on the part of the bail in this cause, obtained a rule *nisi* to set aside the plaintiffs' proceedings on the bail-bond, of which the plaintiffs had taken an assignment, on the ground of an irregularity in the notice of bail, which omitted to describe the bail as housekeepers or freeholders, as required by 2 *Reg. Gen. T. T. 1 Will. 4 (a)*.

Omission in the notice of bail to describe the bail as housekeepers and freeholders, does not, under the rule of *Trinity Term, 1831*, authorize the plaintiff to take an assignment of the bail-bond. The objection should be made when the bail come up.

Jones, Serjt., now shewed cause.—The rule in question not having been complied with, the notice of bail was a mere nullity. In *Wallace v. Arrowsmith (b)*, the plaintiff was held entitled to take an assignment of the bail-bond, the notice of bail being a nullity. And in a case in this Court, last term, where it was objected that the notice did not, in conformity with the rule, state the residence of the proposed bail during the last six months, and omitted to describe the nature and value of the property, in respect of which they proposed to justify, the Court held the objection valid.

Wilde, Serjt., in support of his rule, submitted that the objection to the notice should have been taken when the bail came up to justify: and that the notice could not be treated as a mere nullity.

TINDAL, C. J.—It seems to me that the notice in this case was merely informal. It is not every trifling error that will enable a plaintiff to take the proceedings out of the control of the Court. If it were so, a blank left in the notice for

(a) *Ante*, p. 103.

(b) 2 Bos. & Pull. 49.

1832.

BELL
v.
FOSTER.

a street, or for the number of a house, or the like, would be held to authorize an assignment of the bond. This would evidently be leading the parties into a great and unnecessary expense that was not contemplated by the rule. The proper time for the plaintiffs to object to the notice was, when the bail appeared to justify. I think the rule must be made absolute.

The rest of the Court concurred.

Rule absolute.

Saturday,
April 28th.

BRIDGER v. AUSTIN.

The motion under 1 *Reg. Gen. H. T.* 2 *Will. 4*, s. 49, that sticking up a notice of action in the office may be deemed good service, where the defendant's residence is unknown, is *absolute* in the first instance.

SPANKIE, Serjt., on the part of the plaintiff, moved for a rule that the sticking up the notice of declaration in this cause in the office might be deemed good service thereof upon the defendant, under 1 *Reg. Gen. H. T.* 2 *Will. 4*, s. 49 (a), by which it is ordered, that, "where the residence of a defendant is unknown, notice of declaration may be stuck up in the office, but not without previous leave of the Court."

The affidavit in support of the motion stated the last known place of abode of the defendant, that he had not been there for two months past, and that the deponent, notwithstanding diligent endeavours, could not ascertain where his present residence was.

Per Curiam.

Rule absolute.

(a) *Ante*, p. 189.

END OF EASTER TERM.

Trinity Term.

IN THE SECOND YEAR OF THE REIGN OF WILLIAM IV.

1832.

ADAMS v. BROWN.

Friday,
June 15th.

COLERIDGE, Serjt., on a former day, obtained a rule, calling on the plaintiff to shew cause why he should not give security for costs, on an affidavit which stated that the plaintiff was insolvent, and had assigned all his effects for the benefit of his creditors, and therefore had no interest in the suit.

Before moving for security for costs, an application must be made to the opposite party to give security.

Adams, Serjt., shewed cause, on an affidavit stating that no previous application had been made to the plaintiff or his attorney for security. He submitted that insolvency was no ground for the motion—*Snow v. Townsend* (a); and referred to *Bass v. Clive* (b), where the Court refused to grant a rule for security for costs, on the ground that no application had previously been made to the opposite party.

Coleridge, in support of his rule.—*Bass v. Clive* was cited in *Hancock v. Smith* (c), and said by Lord *Ellenborough* to have been overruled. Although an uncertificated bankrupt suing for his own benefit, as for the produce of his earnings since the bankruptcy, cannot be compelled to give security for costs, *Cohen v. Bell* (d); yet it

(a) 6 Taunt. 123; S. C. 1 Marsh.
477.

(b) 3 Mau. & Selw. 283.

(c) 2 Chit. 150.

(d) 1 Tidd's Prac. 580.

1832.
 ADAMS
 v.
 BROWN.

is otherwise where the action is brought or proceeded in by the bankrupt, whether certificated or not, for the benefit of his assignees. *Sanders v. Purse*, and *Robertson v. Arnold* (a). The same doctrine will apply to the case of an insolvent.

Per Curiam.—This is in effect an application to stay the proceedings. From all the authorities, the better practice appears to be, to make an application to the party before moving for security for costs, although, it is true, there are authorities both ways.

Rule discharged (b).

(a) 1 Tidd's Prac. 581.

C. 2 C. & J. 207; 1 Reg. Gen. H.

(b) See *Jones v. Jones*, post; S. T. 2 Will. 4, s. 98, ante, p. 196.

Friday,
 June 15th.

A Judge at
 Chambers has
 power to award
 costs.

DOE d. PRESCOTT v. ROE.

THIS was an action of ejectment, wherein judgment had been signed, a writ of possession issued and executed, and possession taken under it. Upon an application to Mr. Justice *Park*, at Chambers, he ordered the proceedings to be set aside, *with costs*.

Jones, Serjt., in the last term, obtained a rule *nisi*, to set aside this order, on the ground that a Judge at Chambers had no power to award costs. He referred to *Read v. Lee* (a).

Wilde, Serjt., on a subsequent day shewed cause.—The entire argument in the case cited leads to the conclusion that the power contended for should exist, although the Court seem to doubt it. Suppose a party in prison under an erroneous *ca. sa.*, at the commencement of *Tri-*

(a) 2 Barn. & Ald. 415.

nity vacation, is he to remain in custody until the following *Michaelmas* Term, unless he will elect to apply to the less beneficial tribunal, at the price of losing his costs? Public convenience and justice equally require that the Judge should have this power.

1832.
 }
 DOZ
 d.
 PRESCOTT
 v.
 ROE.

Jones, Serjt., contra.—No authority has been cited on the other side in support of the power of the Judge at Chambers to award costs; it has never been the practice to allow them, unless with consent of the parties.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the Court:—

The question raised upon this application is, whether a Judge at Chambers has authority to make an order for the payment of costs by the party against whom he decides on a point brought before him on summons.

The authority of a Judge at Chambers to make orders in the various cases which are brought before him, is, when considered upon principle, the authority of the Court itself; for, no order which is made can be enforced by attachment until it has first been made a rule of Court; and the party who disputes the propriety of the order has the opportunity, as in the present instance, to question its validity by application to the Court. On any other principle, it is difficult to account for the validity of many acts done by a single Judge at Chambers, such as, setting aside irregular judgments signed in vacation, which judgments are to be considered on principle the acts of the whole Court, discharging persons under writs of execution improperly taken out, and the like. And, considered as resting on this principle, we see no reason why a single Judge should not make the payment of costs a part of his order; because, until such order is

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 }
 DOB
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made a rule of the Court, where the party called upon has the opportunity to contest it, it is altogether inoperative. It would certainly impose a great hardship in many cases upon suitors, if no such power existed. Costs are in many cases so important a consideration with the poor suitor, that, if he could not obtain them at Chambers, he would make his application to the Court above, at a much greater expense. If, therefore, he was improperly arrested, or his goods taken in execution, at the commencement of the long vacation, the defendant would be placed in the alternative, either of applying to a Judge at Chambers, subject to the loss of his costs, or of remaining in prison, or being deprived of his goods, until the next term, when he might apply to the full Court.

The want of such power in any case to award costs would probably have the effect of driving parties to apply to that *forum* which had authority to grant them, and thus operate to prevent the frequency of applications to Chambers, where so much of the ordinary practice in a suit is conducted with equal despatch, and with much less expense.

We think, therefore, the Judge at Chambers has the power to direct payment of costs, on the same principle that he has power to exercise any other authority in the progress of a cause; but, at the same time, it is obviously a power which ought to be exercised with care and discretion. The present rule, therefore, must be discharged.

Rule discharged (a).

(a) See *Anonymous*, ante, p. 52; Adol. 415; and *Spicer and Another v. Todd*, post; S.C. 2 C. & J. 165.

1832.

Friday,
June 15th.

AMOR v. BLOFIELD.

THE plaintiff having sued out a bailable writ against the defendant for 28*l.*, the Sheriff accepted an undertaking from the defendant's attorney to put in special bail. The defendant was never arrested. An application was made to the Court that the defendant might be discharged from perfecting special bail, upon entering a common appearance, on the ground of the insufficiency of the affidavit to hold to bail. The plaintiff ultimately recovering only 14*l.*—

The Court will not allow costs under the 43 *Geo.* 3, c. 46, s. 3, to a defendant who had not been actually arrested or held to special bail.

Wilde, Serjt., on the part of the defendant, moved for costs under the 43 *Geo.* 3, c. 46, s. 3.

Andrews, Serjt., shewed cause.—The statute in question only authorizes a defendant to move for costs where he has been actually arrested and held to special bail. The present application, therefore, is not warranted by it.

TINDAL, C. J.—I think the defendant has not brought himself within the statute, so as to entitle him to the relief he seeks. He has neither been arrested nor held to special bail. His attorney gave an undertaking in lieu of a bail-bond; and afterwards, instead of putting in special bail, he obtains a rule to enter a common appearance. Upon the authority, therefore, of *Berry v. Adamson* (a)—where a sheriff's officer to whom a warrant upon a writ against the defendant was delivered, sent a message to him, and asked him to fix a time to call and give bail, and the defendant accordingly fixed a time, attended, and gave bail, and the Court held that this was not an arrest, and that an action for a malicious arrest would not lie against the party

(a) 6 Barn. & Cress. 528; 2 Car. & Payne, 503.

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suing out the writ, although he had no cause of action, I think this rule should be discharged.

The rest of the Court concurring—

Rule discharged.

Saturday,
June 16th.

GODDARD v. JARVIS.

Where a defendant omits to give notice of justification, as required by 1 Reg. Gen. T. T. 1 W. 4, the plaintiff has twenty days to except, as under the old practice.

ON the 1st of *June*, the defendant gave notice of bail, and not four days' notice of justification pursuant to 1 Reg. Gen. T. T. 1 Will. 4 (a). The affidavit of justification was in the form pointed out by the 3rd rule. The plaintiff had taken an assignment of the bail-bond.

Wilde, Serjt., on the part of the defendant, on a former day, obtained a rule *nisi*, to stay the proceedings on the bail-bond, on the ground that the bail had justified.

Jones, Serjt., shewed cause, contending, that, as the defendant had not proceeded under the 1st rule of *Trinity* Term, 1 Will. 4, the plaintiff had still, as under the old practice, twenty days wherein to except to the bail, and therefore that the application was premature.

Wilde, in support of his rule.—According to rule 1, bail may justify at the same time they are put in, upon giving four days' notice. The affidavit of the justification pur-

(a) *Ante*, p. 102. See 1 Reg. Gen. H. T. 2 Will. 4, s. 16, *ante*, p. 185, by which it is directed, that "it shall be sufficient in all cases if notice of justification of bail be given two days before the time of

justification." This being the later rule and applying to "all cases," it is conceived that where bail justify according to 1 Reg. Gen. T. T. 1 Will. 4, two days' notice will be sufficient.

sues the form appended to rule 3; the notice, therefore, was unnecessary.

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v.
JARVIS.

Per Curiam.—It appears to us that the defendant is not in Court for the purpose of making this application. The directions contained in Rule 1, have not been observed by him. Had he done so, the time for excepting would, by the 4th rule, have been limited to one day. But, the 1st rule not having been complied with, the party stands upon the old practice, which allows the plaintiff twenty days to except to the bail.

Rule discharged.

END OF TRINITY TERM.

COURT OF EXCHEQUER,

May Term,

IN THE FIRST YEAR OF THE REIGN OF WILLIAM IV.

1831.

Rex in Aid of *HOLLIS v. BINGHAM*.

A *sci. fa.* having issued upon a recognizance to abide an award, concerning matters in difference upon an extent in aid, and the defendant having succeeded upon demurrer:—*Held*, that he was not entitled to costs.

AN extent issued in aid of *Hollis*, the prosecutor, to recover a debt due to him from the defendant. The matters in difference between *Hollis* and the defendant were referred to the arbitration of *D.*, the defendant entering into a recognizance to abide the event of the award. *M.* was afterwards substituted for *D.*, by rule of Court. He having made his award, a *sci. fa.* issued on the defendant's recognizance. The defendant pleaded *nul tiel record*. *Hollis* replied, that *M.* was substituted for *D.* by rule of Court, and that *M.* made his award. The defendant demurred to the replication. After argument, the Court ordered the demurrer to be allowed with costs. A writ of error was afterwards brought, and the judgment of the Court affirmed. The defendant taxed his costs in pursuance of the order of the Court, and a rule for rescinding so much of the order as directed the payment of the costs to the defendant was obtained.

Dampier shewed cause, and contended, that the prosecutor was liable to pay costs. He cited *Rex v. Boyle* (a).

(a) 1 Price, 434.

Manning, in support of the rule, contended, that, as the King himself neither pays nor receives costs, so are costs neither paid nor received by private individuals who use the name of the *King*, though suing for their own benefit. He cited *Wilkinson* q. t. v. *Abbott* (a), *Rex* v. *Coram* (b), *Rex* v. *Miles* (c), *Golding* v. *Dyos* (d), and referred to the 23 *Hen.* 8, c. 15, 4 *Jac.* 1, c. 3, 8 & 9 *Will.* 3, c. 11, s. 3, and the 3 *Hen.* 7, c. 10.

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LORD LYNDRHURST, C.B.—The cases of *Rex* v. *Coram* and *Rex* v. *Miles*, determine the question. The defendant is not entitled to costs.

Rule absolute (e).

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|-----------------------------------|---|
| (a) Cowp. 366. | 1 C. & J. 379, and 1 Tyr. 262. See |
| (b) 1 Anst. 50. | the 33 <i>Hen.</i> 8, c. 39, s. 54; <i>Man.</i> |
| (c) 7 T. R. 367. | <i>Ex. Pr. Rev.</i> 69; and <i>Ricketts</i> v. |
| (d) 10 East, 2. | <i>Lewis</i> , 1 B. & Adol. 197. |
| (e) This case is also reported in | |

◆

BOWER v. KEMP.

IN this case, the declaration was delivered on the 22nd of *November*. On the 25th, the defendant pleaded in abatement, that “the said promises in the said declaration” mentioned, were entered into by him and others. The affidavit of verification was sworn at *Huddersfield*, on the 13th of *November*. This being before the declaration was delivered, the plaintiff treated the plea as a nullity, and signed judgment on the 1st of *December*. On a motion to set aside this judgment for irregularity—

If the affidavit of verification to a plea in abatement be sworn, before the declaration is delivered, the plaintiff may treat the plea as a nullity.

BAYLEY, B., said—The plea refers to the declaration, which was not in existence at the time when the affidavit

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v.
KEMP.

was sworn: the plea is therefore a nullity, and the judgment is regular.

Rule refused (a).

(a) This case is also reported in *ber*, 4 East, 348; *Pearce v. Davy*, 1 C. & J. 287. See *Lang v. Com-* 1 Ken. 364; *S. C. Sayer*, 293.

SAME v. SAME.

In order to set aside a regular judgment, on payment of costs, the affidavit must state that the defendant has "a good defence upon the merits." It is insufficient to state, that he has "a good and meritorious defence."

THE application was then rested on the payment of costs, and on an affidavit of merits. A rule having been granted, it appeared, on shewing cause, that the affidavit was not in the usual form—that the defendant had "a good defence upon the merits," but that he had "a good and meritorious defence" to the action.

BAYLEY, B.—The application in such a case as this must be founded on an affidavit consistent with the practice of the Court. For a long period, all the Courts have required an affidavit, that the defendant has "a good defence upon the merits." All we can do is, to enlarge this rule on payment of costs, in order to afford the defendant an opportunity of amending his affidavit.

Rule enlarged.

EDWARDS v. BROWN and Others.

If a *venire de novo* be awarded, the Court has no power over the costs of the application for that writ.

THIS was an action of debt on bond. The breaches assigned were under the 8 & 9 *Will.* 3, c. 11, s. 8. The cause was tried twice. The Jury at the first trial found for the plaintiff, but assessed no damages. Upon this ground, a *venire de novo* was awarded, and the costs of the

application for that writ were reserved for consideration, until after the second trial. A verdict was again found for the plaintiff.

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EDWARDS
v.
BROWN.

John Evans applied for the costs of the application for a *venire de novo*.

Russell, Serjt., and *E. V. Williams*, opposed the application, and cited *Lickbarrow v. Mason* (a), and *Bird v. Appleton* (b), and 1 *Wms. Saund.* 58, n. (1).

BAYLEY, B.—The Court has no discretion on this subject. It would have been error if the plaintiff had not assessed his damages; he was, therefore, under the necessity of going down again to trial, in order to remedy the default. The expense of the first trial was in fact thrown away; and I know not what authority the plaintiff has for saying that the defendant shall bear the expense incident to the first trial.

Rule refused (c).

(a) 6 T. R. 181.

(b) 1 East, 111.

(c) See also this case, 1 C. & J. 354, and 1 Tyr. 281.

END OF HILARY TERM.

Easter Term.

IN THE FIRST YEAR OF THE REIGN OF WILLIAM IV.

1831.

April 20th.

LAUGHER v. LAUGHER.

The Court will not grant an attachment for the non-performance of an award, the performance of which is demanded by a third person acting under a power of attorney, unless the subscribing witness makes an affidavit of its execution, and a copy of the power of attorney is left with the party upon whom the demand is made.

A RULE was obtained in this case to shew cause why an attachment should not issue for the non-performance of an award. The affidavit supporting the application stated, that the demand had been made "under and by virtue of a power of attorney, signed and delivered by the plaintiff," to the party by whom the demand was made. There was, however, no affidavit by the subscribing witness of the execution of the power of attorney, nor was a copy of the power of attorney left with the defendant when the demand was made.

Clarke and *Hobroyd* shewed cause against this rule; and

John Jervis supported it.

Per Curiam.—The practice on this point is correctly stated by Mr. *Tidd*(a). A mere parol authority to demand the performance of the award would not be sufficient; and, if a power of attorney is necessary for that purpose, it must be shewn by legal evidence that that delegation of authority was properly executed. It is also necessary that

(a) 2 Tidd's Prac. 837, ed. 9.

a copy of the power of attorney should be left with the party upon whom the demand is made, in order that he may be satisfied that the party making the demand acted under a legal authority.

1831.
LAUGHER
v.
LAUGHER.

Rule discharged, with costs (a).

(a) See this case reported in 1 B. Moore, 44; *Hartley v. Barlow*, 1 C. & J. 398, and 1 Tyr. 352; see Chit. Rep. 229; *Jackson v. Clarke*, also, *Longman v. Holmes*, 2 Sir W. M'Cl. 72; 13 Price, 208. Black. 990; *Bass v. Maitland*, 8 J.

The ATTORNEY-GENERAL v. CARPENTER.

A NOTICE to plead having been served upon the defendant, he applied to the Court to be allowed to plead in person, he having been informed at the office, that he could not so plead without leave of the Court.

In an information by the Attorney-General, a defendant may plead in person.

Per Curiam.—You may take your rule.

Upon the suggestion of the defendant, he was directed to hand over his plea to the officer in Court; which he accordingly did (a).

(a) This case is also reported 1 C. & J. 409; and 1 Tyr. 351.

RISDALE v. KELLY.

IN this case the declaration, which was in debt, demanded 60*l*. There were six counts in it, and each was for 10*l*., parcel &c. The defendant pleaded that he did not owe "the said sum of 10*l*." above demanded, or any part

A plaintiff is not entitled to treat a plea as a nullity, which will be rendered a good plea by rejecting surplusage.

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RISDALE
v.
KELLY.

thereof. The plaintiff signed judgment as for want of a plea.

Ball obtained a rule for setting aside this judgment, and cited *Attwood v. Bonacich* (a).

Jervis and *Temple* shewed cause, and cited *M'Donnell v. M'Donnell* (b).

Lord LYNDHURST, C. B.—No sum of 10*l.* is demanded in this declaration. Therefore, when you say, that you do not owe the said sum of 10*l.* above demanded, I should incline to think, that the words “ of 10*l.*” may be rejected as surplusage. At all events, it is too much to treat such a plea as a nullity.

The other Judges concurred.

Rule absolute (c).

(a) 1 D. & R. 474.

(b) 3 B. & P. 174.

(c) This case is also reported in 1 C. & J. 410, and 1 Tyr. 387.

REX. v. HIND, Clerk.

To a special *ca. utlag.* the sheriff returned an inquisition finding that the defendant had benefices, but no lay fee; the Court awarded a writ of sequestration on reading the transcript of the outlawry and inquisition.

ARCHBOLD moved for a writ of sequestration to be awarded to the Bishop of *Litchfield* and *Coventry*, to sequestrate the ecclesiastical profits of the defendant's benefices. The defendant had been outlawed in the Court of *King's Bench*, and writs of special *ca. utlag.* were issued, directed to the sheriffs of *Shropshire* and *Staffordshire*. They took inquisitions accordingly, and the juries found that the defendant was possessed of benefices, but of no lay fee. These inquisitions were returned to the Court of *King's Bench*, and a transcript of the outlawry, with the

inquisitions, was brought into this Court, and entered as read. It was admitted, that there was no decision to authorize the application now made, but, upon principle, the writ ought to be awarded. The Court was also referred to its Minute Book, under the date of the 26th *June*, 1776.

1831.

REX
v.
HIND.

Per Curiam.—The writ may go (a).

(a) This case is also reported in 1 C. & J. 389, and 1 Tyr. 347.

SMITH v. COOPER'S Assignees.

CHILTON objected to the justification of bail, unless the sum of 5*l.* was deposited with the Master, to cover the costs of a former successful opposition.

In this Court, if bail be once successfully opposed, they cannot justify until 5*l.* has been deposited with the Master to cover the costs.

BAYLEY, B.—In the *King's Bench*, the plaintiff is not entitled to have costs deposited, unless the defendant has given three notices.

The Master said that in this Court the plaintiff was entitled to have the deposit made after one successful deposit.

Costs deposited (a).

(a) This case is reported in 1 C. & J. 460, and 1 Tyr. 378. The plaintiff is entitled to costs on the second notice of justification, if a

brief be delivered to counsel to oppose the bail upon the first notice. *Barron v. Whitehead*, 2 Y. & J. 3.

1831.

MASON v. CLARKE.

If a cause be tried at the sittings in term, a new trial may be moved for at any time within four days after the return of the *distringas*, although more than four days have elapsed since the trial.

THESIGER applied for leave to move, in this case, for a new trial, more than four days from the time of trial, but within four days from the return of the *distringas*. The cause had been tried at the sittings in term.

The Court, on the authority of *Kirkham v. Marten* (a), permitted him to move (b).

(a) 2 B. & Ald. 614.

1 C. & J. 411. See 1 Reg. Gen.

(b) This case is also reported in H. T. 2 W. 4, s. 65, *ante*, p. 191.

GOULD v. DAVIS.

Where a plaintiff and defendant collude in the settlement of an action, in order to deprive the plaintiff's attorney of his costs, and a bill for debt and costs is given by the defendant in furtherance of that collusion, the Court will compel the delivery up of that bill.

IN this case, the action was brought to recover 25*l*. While the cause stood for trial, and shortly before the assizes, the defendant called upon the plaintiff's attorney, and told him that he had a defence; but that, as the plaintiff was a beggar, he would give 23*l*. in discharge of the debt and costs. The plaintiff's attorney told the defendant, that the costs would amount to that sum; but, if the plaintiff would accept 5*l*. for his debt, he, the attorney, would not dissuade the plaintiff from such an arrangement. On the day this conversation took place, the defendant went to an inn, near the plaintiff's residence, sent for the plaintiff, and prevailed upon him, without the privity or assent of the attorney, to settle the action for 24*l*., by a written memorandum, which included debt and costs. A bill for 24*l*. was given to the plaintiff, and deposited with a person named *Pollard*, with whom it was to remain until it was due. The attorney applied to have the note

delivered up to him, on the ground that this arrangement was made for the purpose of depriving him of his costs. A rule having been obtained for that purpose—

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GOULD
&
DAVIS,

John Evans shewed cause, and

Jervis supported it.

BAYLEY, B.—This rule ought to be made absolute. Wherever there is a collusion between a plaintiff and a defendant, for the purpose of depriving the attorney of his costs, the attorney may proceed with the action for those costs. In the present case, the plaintiff and defendant settle the debt between themselves, the defendant being well aware of the claim of the attorney, and that the plaintiff was unable to pay the costs. The plaintiff has only a right to recover his debt; he has no right to get into his hands the costs, which should come into the hands of the attorney. The defendant, by giving this security, lent himself to the plaintiff; and the plaintiff being a beggar, in what a situation would the attorney be placed by the arrangement between these parties, if the Court were not to interfere in the manner prayed by this rule? The present is not the case of a payment of money, but of giving a security, which includes the costs and a part of the debt. The security being given, who ought to have the benefit of it? If the cause went on, the attorney would have had a lien on the fruits of the action. Here, instead of a judgment, a security is obtained—an undertaking by the defendant to pay at some future day. Part of this is clearly in satisfaction of the claim of the plaintiff's attorney. It seems to me, therefore, that the plaintiff's attorney has a right to the possession of this document for the purpose of first paying himself, and as a trustee accountable to the plaintiff for the residue. This will be the right and just

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v.
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course as between all parties. The plaintiff has agreed that the defendant should be discharged on payment of 24*l*. Our present decision will satisfy that agreement. The plaintiff will receive it without any deduction, except the costs, to which he is liable, and has engaged to pay to his attorney. I am, therefore, of opinion that this rule should be made absolute.

The rest of the Judges concurred.

Rule absolute (a).

(a) This case is also reported in *Welsh v. Hole*, Dougl. 237; *Turwin v. Gibson*, 3 Atk. 720; and *Griffin v. Eyles*, 1 H. Black. 122; *Chapman v. Haw*, 1 Taunt. 341.

END OF EASTER TERM.

Trinity Term.

IN THE FIRST YEAR OF THE REIGN OF WILLIAM IV.

DUCKETT, Bart. v. WILLIAMS.

1831.

IN this case a rule *nisi* had been obtained after plea pleaded, but before issue joined, for a commission to issue to examine witnesses in *France*; and that the trial of the cause be stayed until the commission should be returned, under the 1 *Will.* 4, c. 22, s. 4. (a). Cause was shewn against this rule.

The Courts at *Westminster* have power under the 1 *Will.* 4, c. 22, s. 4, to issue commissions for the examination of witnesses, although not resident in the King's dominions.

BAYLEY, B.—It is very desirable, particularly in cases upon policies of insurance, that the Courts of common law should have the power of issuing commissions for the examination of witnesses into all countries; and with a view to confer that power upon Courts of law, the statute in question was passed. By the 13 *Geo.* 3, c. 63, s. 44, power is given to any Court in which an action is depending, to provide and award a writ in the nature of a *mandamus* to the Judges in *India* for the examination of witnesses. Under that statute the *mandamus* issues to the Judges; and, having that provision in view, this statute, by the first section, extends that provision to all places within his Majesty's dominions. Under the first section a writ in the nature of a *mandamus* may be directed to the Judge

(a) 2 Dowl. Stat. 43.

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DUCKETT
v.
WILLIAMS.

es within his Majesty's dominions. Now, if it were intended to confine the act to places within his Majesty's dominions, the first section would seem to be an adequate provision, and there would be no occasion to make provision for the examination of witnesses under any other commission. But the 4th section provides, that it shall be lawful to and for each of the Courts at *Westminster*, &c., to order a commission to issue for the examination of witnesses on oath, at any place or places out of the jurisdiction of the Court where the action shall be depending. Why is a limited construction to be put upon these words, or why should the words, "at any place or places," be limited to places within his Majesty's dominions? The act may not be obligatory, and the Court may exercise a discretion to be regulated by the circumstances of each case, whether it will issue a commission; but I do not think that the power of the Court to issue a commission is confined to places within his Majesty's dominions. We are confirmed in this construction by the course which has been adopted by the Court of *King's Bench*.

The rest of the Court concurred.

Rule absolute (a).

(a) This case is also reported in 1 C. & J. 510, and 1 Tyr. 502. See *Davidson v. Nicol*, *ante*, p. 220.

SIMONDS v. FOLKENHAM.

If issue is joined in an issuable term in a country cause, and no notice of trial given for the ensuing Assizes, the defendant cannot move for judgment as in case of a nonsuit, until the term next after the second Assizes.

THIS was a country cause. Issue was joined in *Hilary* Term, but no notice of trial was given for the ensuing Assizes. A rule *nisi* for judgment as in case of a nonsuit was obtained in *Trinity* Term, and—

cannot move for judgment as in case of a nonsuit, until the term next after the second Assizes.

Sir *W. Owen* shewed cause against it. He contended that the application was premature, and cited *Redward v. Way* (a), *Crowley v. Dean* (b), *Spiers v. Parker* (c), and the rule of Court of *Easter Term*, 1824 (d).

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SIMONDS
v.
FOLKENHAM.

BAYLEY, B.—If issue is joined in the term immediately before the Assizes, and a rule of Court directs, that judgment as in case of a nonsuit shall not be granted in the next term after issue joined, unless notice of trial has been given, it is clear upon every principle of common sense, that judgment as in case of a nonsuit cannot be moved for in a country cause, where no notice of trial has been given until the term after the second Assizes. The rule means that you cannot move for judgment as in case of a nonsuit, where no notice of trial has been given in a town cause, until the second term after that in which issue is joined; and, in a country cause, until the term after the second Assizes after issue joined.

Rule discharged with costs (e).

(a) 13 Price, 453.

(b) 1 C. & J. 18.

(c) *Ib.* n.

(d) M'Clel. 708.

(e) This case is also reported in 1 C. & J. 513, and 1 Tyr. 501.

ANONYMOUS.

SIR *W. Owen* opposed the justification of bail by affidavit, on the ground that one of the bail was described as residing in *Somers Town*, the 4 *W. & M.* c. 4, s. 2, requiring bail within ten miles of the city of *London* or *Westminster* to justify in person.

Where all reside within ten miles of the city of *London* or *Westminster*, they must justify in person.

The Master certified that the practice was conformable to the statute.

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 ANONYMOUS.

Time was allowed, on payment of costs, for the bail to justify in person (a).

(a) This case is also reported in 1 C. & J. 516.

ROBERTS v. WRIGHT.

In an action upon an I. O. U. the venue may be changed upon the usual affidavit.

JOHN JERVIS shewed cause against a rule obtained on the usual affidavit, for changing the venue in an action upon an I. O. U. He contended that the instrument was like a promissory note, in an action upon which the venue could not be changed.

Henderson, in support of the rule, contended that an I. O. U. was not like a promissory note, for it required no stamp, and it did not pass by delivery.

Per Curiam.—The rule must be absolute for changing the venue.

Rule absolute (a).

(a) This case is also reported in 1 C. & J. 547, and 1 Tyr. 532. See also 1 Reg. Gen. H. T. 2 Will. 4, s. 103, *ante*, p. 197.

MEMORANDUM.

IN future it will not be necessary to give a rule to bring in demurrer books, but the motion for a *concilium* may be made without it. And it will be sufficient to deliver the books to the Barons two days before the day of argument.

END OF TRINITY TERM.

Michaelmas Term.

IN THE SECOND YEAR OF THE REIGN OF WILLIAM IV.

DOE v. ROE.

1831.

WIGHTMAN moved for judgment against the casual ejector. The affidavit stated a service "on *A. B.* and *C. D.*, as executors."

An affidavit of service of a declaration in ejectment upon "*A. B.* and *C. D.*, tenants in possession as executors," is insufficient.

BAYLEY, B.—Why are the words "as executors" introduced? They are qualifying words, which induce a doubt. On an indictment for perjury, it might be said, that the possession of one was the possession of both. The affidavit must be amended.

Rule refused (*a*).

(*a*) This case is also reported in 2 C. & J. 45, and 1 Tyr. 499.

FENTON v. WARRE.

JOHN Jervis opposed bail on the ground that the notice did not state that the bail had respectively resided at their places of residence described in the notice for the last six months, according to 2 Reg. Gen. T. T. 1 Will. 4 (*a*).

By 2 Reg. Gen. T. T. 1 Will. 4, it is sufficient to state in the notice of bail the residence of the bail for the last six months, without going

on to state that such was their residence during that period.

(*a*) *Ante*, p. 103.

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FENTON
v.
WARRE.

BAYLEY, B.—It is not necessary that the notice should state that, because it must be assumed, until the contrary appears, that the bail have resided at the places of residence described for the last six months. If the fact be otherwise, the plaintiff may raise the objection by affidavit.

Bail allowed (a).

(a) This case is also reported in 2 C. & J. 54, and 2 Tyr. 158. See also *Anonymous*, ante, p. 160.

HALTON v. STOCKING.

Where a rule nisi was obtained for setting aside an attachment for irregularity, and the defendant's attorney offered to waive the proceedings, and pay the costs, but the rule was persisted in, the Court made the rule absolute with costs, up to the time of the offer, the plaintiff's attorney paying the costs subsequently incurred.

STEER shewed cause against a rule for setting aside an attachment on the ground of irregularity. He admitted the irregularity, but produced an affidavit stating that the defendant's attorney had offered to waive the proceeding and pay the costs, notwithstanding which the rule was persisted in. He cited *Beeston v. Beckett* (a), to shew that the Court would, in such a case, require the party applying for the rule to pay costs incurred subsequently to the offer.

Per Curiam.—The rule must be made absolute. The defendant must pay the costs incurred up to the time when the offer was made, and the attorney for the plaintiff must pay the costs subsequently incurred.

Rule accordingly (b).

(a) 4 M. & R. 100.

(b) This case is also reported in 2 C. & J. 60, and 2 Tyr. 165.

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GIBSON *v.* WHITE.

BUTT shewed cause against a rule *nisi* obtained by *Comyn*, on the part of the bail, for time to render the defendant, who was in the custody of the keeper of *Newgate*, under a warrant from commissioners of bankrupt, and was to be brought before the commissioners in a few days. He contended, that, as the bail had not justified, they could make no motion; for, until they had, they were not in Court.

Where a defendant is in custody under a warrant of commissioners of bankrupt, the Court will enlarge the time for rendering the defendant, though the bail have not justified.

Per Curiam.—As the defendant is as it were in criminal custody, and the bail cannot make the render in due time, this is an exception to the general rule, and therefore the bail ought to have time to render.

Rule absolute (*a*).

(*a*) This case is also reported in 2 C. & J. 85, and 2 Tyr. 162.

POOLE *v.* SALTER.

THE defendant in this case had pleaded judgment recovered. Sufficient time not remaining in the term for the plaintiff to move for a rule to produce the record, an application was made on his part, that he might be at liberty to treat the plea as a nullity (on an affidavit of its falsehood), and sign judgment. Unless the application was granted, the plaintiff would be delayed until the next term. It appeared, however, that the plea had been delivered in sufficient time for the plaintiff to have proceeded and got his judgment in the usual way.

The Court refused to set aside a plea of judgment recovered on affidavit of its being totally false, though there did not remain time for the plaintiff to get judgment in the term, he having neglected to take the regular steps for that purpose in the earlier part of the term.

Per Curiam.—The plaintiff should have taken the re-

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gular steps to obtain judgment in the earlier part of the term.

Rule refused (a).

(a) This case is also reported in 2 C. & J. 85, and 2 Tyr. 139.

HODGKINSON v. WHALLEY.

A plaintiff cannot have concurrent writs of *fi. fa.* and *ca. sa.* and act under both.

R. v. RICHARDS obtained a rule to discharge the defendant out of custody, on the ground that the *ca. sa.*, under which he had been taken, had been issued before the return of a concurrent writ of *fi. fa.*, under which a levy had been made. The whole amount of the levy was paid over to the landlord for rent, under the 8 *Anne*, c. 14, s. 1, except the sum of 17*s.* 6*d.*, which went towards the expenses of the execution.

Follett shewed cause.—The plaintiff had a right to issue both writs, but only to execute one (a). The question then is, whether there was any execution of the *fi. fa.* Now, here, the rent swallowed up all except the sum of 17*s.* 6*d.*, which must go towards the expenses. There was, therefore, no occasion to return the writ of *fi. fa.*, as nothing was done under it towards satisfying the plaintiff.

Per Curiam.—The record would be irregular, if this rule were not made absolute; for, there would appear an award of both a *fi. fa.* and a *ca. sa.* at the same time. No doubt, both may issue together, because, the practice is, not to enter them on the record, if nothing is done. But, if you execute one, you must make an entry of the return of that, before you can award the other. Here, there has

(a) *Miller v. Parnell*, 6 Taunt. 371.

been a seizure under the *fi. fa.*; and, if an action of trespass were brought for the seizure, you would have to justify under the *fi. fa.* It is clear, on principle, that you cannot have two writs, and act under both at the same time (a).

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Rule absolute, with costs, if defendant would undertake to bring no action; without costs, if he would not (b).

- (a) *Edmond v. Ross*, 9 Price, 5. v. *Stevens*, ante, p. 57; *Anonymous*, ante, p. 59; and *Jones v. Tye*, ante, p. 181.
(b) See this case also reported in 2 C. & J. 86. See also *Laves v. Codrington*, ante, p. 30; *Prescott*

WILSON v. MINCHIN.

PLATT shewed cause against a rule obtained by *Follett*, calling on the plaintiff to find security for costs. An order for time to plead had been granted, and, therefore, he contended, that the application was too late. He cited *Duncan v. Stent* (a).

Security for costs may be applied for after an order for time to plead.

Per Curiam.—In that case the application was made after plea pleaded. A defendant may come to ask for security for costs at any time before plea pleaded. The principle is, that the application should be made in the earliest stage of the proceedings, in order to avoid unnecessary expense.

Rule absolute (b).

- (a) 5 B. & Ald. 702; 1 D. & R. 348. *Rex v. Day*, ante, p. 32; *Rex v. Patteson*, Ib.; Chit. Prac. 101; and 1 Reg. Gen. H. T. 2 W. 4, s. 98, ante, p. 196.
(b) This case is also reported in 2 C. & J. 87, and 2 Tyr. 166. See *Brown v. Wright*, ante, p. 95; and

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ANONYMOUS.

If one of two plaintiffs be resident abroad, and the other in this country, the Court will not compel the absent plaintiff to give security for costs.

PLATT shewed cause against a rule obtained by *Follett*, for security for costs, on the ground that one of the plaintiffs was resident abroad; the other plaintiff was, however, resident in this country.

Per Curiam.—We know of no case in which security for costs has been required by the Courts, where one plaintiff was resident in this country, and the other abroad.

Rule discharged (a).

(a) This case is also reported in 535, ed. 9; and 1 Reg. Gen. H. T. 2 C. & J. 88. See 1 Tidd, Prac. 2 W. 4, s. 98, *ante*, p. 196.

PERRY v. WILLIAM TURNER, JAMES TURNER, and ISAAC JOEL.

Where one of several parties to a *cognovit* signs after the others, his signing relates back to the time of their signing.

Payment to a plaintiff's attorney's clerk unauthorized to receive, is no waiver of the plaintiff's right.

Where, at the instance of one of several joint defendants, the taxation of the plaintiff's costs

A COGNOVIT, dated the 3rd of *November*, by which 5*l.* was to be paid on the 5th, and the residue of the plaintiff's demand at stated periods, the plaintiff being at liberty to sign judgment, and issue execution for the whole upon any default, was signed by two defendants, *Wm. Turner* and *James Turner*, on the 3rd, and by the other defendant, *Isaac Joel*, on the 7th. On the 7th, the first instalment was paid to the plaintiff's attorney's clerk, who had no authority to receive it; and, subsequently on that day, judgment was signed. On the 8th, notice was given to tax costs on the 9th, which, at the request of one of the

is deferred, an entire day's notice of taxation on another day is not necessary.

defendants, was postponed till the 10th. On the morning of that day, the defendant's attorney received a notice to attend the taxation of costs at two o'clock that day. He did not attend, and the costs were taxed in his absence. A rule *nisi* was obtained by

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Lloyd Hall to set aside the judgment and execution for irregularity, upon the grounds, first, that the *cognovit* had not been signed by *Joel* before the first default; secondly, that the notices of taxation were insufficient; and, lastly, that judgment could only be entered up for the one instalment due. He cited *Butler v. Bulkley (a)*, *Astley v. Weldon (b)*, *Charrington v. Laing (c)*, and *Kemble v. Farren (d)*.

Aglionby shewed cause.

Per Curiam.—If any injustice has been done by the Master's taxing the costs in the absence of the defendant's attorney, it may be sent back to him, to see whether there should be any deductions: but, independantly of that consideration, the judgment and execution seem to us to be regular. The objection to the judgment is, that, when the *cognovit* was executed by *Joel*, one of the defendants, the time for payment of the first instalment had gone by, and therefore, that, though the *cognovit* in form was to give indulgence, it was in effect forfeited. We are, however, of opinion, that, when the party executed, he executed subject to all the same consequences as if he had executed it at the time when it bore date. The date shews to what period of time the *cognovit* may be considered as referring, that is, the 3rd; it was then executed by two of the defendants, and the third does not execute it until the 7th; but, when he does execute, he agrees to the language

(a) 8 Moore, 104; S. C. 1 Bing. 242.

243. (d) 3 M. & P. 425; S. C. 6 Bing.

(b) 2 Bos. & Pul. 346. 141.

(c) 3 M. & P. 587; S. C. 6 Bing.

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of the *cognovit*, and puts himself in the same situation as if he had executed on the 3rd. He might think, and hope, and expect, that judgment would not be immediately signed, but there was nothing to prevent the plaintiff from doing so. We think, therefore, that the execution related back to the time of the date; and that the plaintiff was at liberty, if he thought fit, to insist on his right immediately to sign judgment on the *cognovit*.

As to the payment to the attorney's clerk on the morning of the 7th, as the clerk had no authority to receive it, the plaintiff's right was not waived.

Then, as to the objection that no regular notice of taxation of costs was given, we are not clear that the plaintiff might not have taxed on the 10th, after what had taken place, without any further notice; but, at all events, he was not bound to give one day's notice; and if he gave a fair and reasonable notice, his proceedings were not irregular. On the morning of the 10th, the defendant's attorney had notice of taxation for two o'clock that day. It is known, however, that the Master does not attend until three, and, therefore, that is a notice of two for three. The defendant's attorney goes at two, and not finding the plaintiff's attorney in attendance, he goes to the office of the latter, and tells his clerk, that it is not convenient to attend any longer on that day; but, it is not sworn, that it is inconvenient for him to attend. The clerk, however, did not acquiesce in any delay, but informed him that the attorney for the plaintiff was gone to the Master's office with the papers. If the defendant's attorney had gone there, he might have been present at the taxation.

We have cautiously avoided expressing any opinion as to whether a neglect to give notice of taxation of costs gives the defendant's attorney a right to set aside the proceedings for irregularity. The Court has made an order regulating what notice shall be given, but it has not said what the consequences of not following that order shall be. It may be, that the Court would consider it as a matter on

which they are to use their discretion in each particular case, and that in some cases they would set aside the judgment, in others, they would not.

Upon the whole, we are clearly of opinion, that we cannot treat this as an irregular judgment.

Rule discharged, without costs; the Master to say whether any and what deduction should be made from the amount of the costs as taxed (a).

(a) This case is also reported in 2 C. & J. 89, and 2 Tyr. 128. See also *Shaw v. Evans*, 10 East, 576; and *Miller v. Bowden*, 1 C. & J. 563; in which it was holden, that a non-compliance with rules of Court, which are merely directory,

does not avoid the proceedings. But see *Ryley v. Boissomas*, post, and 1 Reg. Gen. H. T. 2 W. 4, ss. 91, 92, ante, p. 196. See also *Edgington v. Proudman*, ante, p. 152, and *Ariel v. Barrow*, 7 Bing. 375.

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Ex parte TOMLINS.

STARKIE moved, that the Town Clerk of *Richmond* might be allowed to verify his return to this Court of estreats &c., by affidavit, without a commission or personal appearance, the amount being under 5*l*.

Clerks of the peace, &c. may verify their returns of estreats &c. to this Court by affidavit, without a commission or personal appearance, where the amount is under 5*l*.

The Court granted the motion, and directed that for the future, where the estreats &c. did not amount to 5*l*., clerks of the peace should be at liberty to verify their returns to this Court by affidavit, without a commission or personal appearance (a).

(a) This case is also reported in 2 C. & J. 122. See *Ex parte Hodgson*, 2 Y. & J. 142. By the 3 Geo. 4, c. 46, s. 14, clerks of the peace, &c. are required to make and deliver into this Court a true and perfect duplicate or certificate of all fines, &c.; and by the 4 & 5

W. & M. c. 24, s. 5, clerks of the peace &c. on returning estreats, are required to take an oath prescribed by that statute, which oath can only be administered by a Baron in open Court, or by commission. See 2 Y. & J. 146, n.

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DOE v. ROE.

The 11 *Geo.* 4 & 1 *Will.* 4, c. 70, s. 36, which affords certain facilities to landlords in recovering possession of premises, to which their title has accrued, does not apply to cases in which the title accrues in *Michaelmas* or *Easter Term*.

COLQUHOUN moved on the 24th of *November*, for judgment against the casual ejector, and submitted that the statute of the 11 *Geo.* 4 & 1 *Will.* 4, c. 70, s. 36, applied to this case. It was an ejectment by a landlord against his tenant, and the right of entry of the former had accrued in the present term. The declaration was intitled of, and served in, this term.

BAYLEY, B.—That statute only applies where the right of entry accrues in or after issuable terms. In other cases you must proceed as formerly (a).

(a) This case is also reported in *Roe, ante*, p. 79; and 1 *Dowl.* 2 C. & J. 123. See also *Doe v. Stat.* 387.

EDENSOR v. HOFFMAN and Another.

Rule 7 of *Reg. Gen. T. T.* 1 *W.* 4, as to imparlances, only applies to cases in which the writ, appearance, and declaration are of the same term.

If the defendant is entitled to an imparlance and takes out a summons for time to plead, which is indorsed by consent, he waives the imparlance, and the plaintiff may sign judgment for want of a plea, before the enlarged time for pleading has expired, if no order be drawn up.

IN this case the writ was returnable in last *Trinity Term*. The declaration was delivered on the 16th of *November*, intitled of *Trinity Term*, and indorsed to plead in four days. On the 18th of *November*, a summons was served for a month's time to plead, which was indorsed by consent for ten days' time to plead. No order was drawn up, and on the 22nd of *November* the plaintiff signed judgment for want of a plea. A rule *nisi* to set aside this judgment for irregularity having been obtained—

R. V. Richards shewed cause.—The defendant was not entitled to an imparlance. By rule 7, of *T. T.* 1 *Will.*

4 (a), it is ordered, "that upon every declaration delivered or filed on or before the last day of any term, the defendant, whether in or out of any prison, shall be compellable to plead as of such term, without being entitled to any imparlance."

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BAYLEY, B.—That is, where the writ, appearance, and declaration, are of the same term. Before the late rule, the defendant was not bound to plead as of the term in which the declaration was delivered, unless the declaration was delivered on or before the fourth day exclusive before the end of the term in which the writ was returnable. By the new rule, the last day is substituted for the fourth day before the end of the term.

R. V. Richards.—But the summons and indorsement were a waiver of the imparlance.

BAYLEY, B.—They amount to an admission that the plaintiff was entitled to a plea as of that term.

Chilton, in support of the rule, contended that the plaintiff having consented to give ten days' time to plead, he ought not to have signed judgment.

LYNDHURST, L. C. B.—The judgment is regular, and can only be set aside upon payment of costs.

Rule accordingly (b).

(a) *Ante*, p. 104.

(b) This case is also reported in 2 C. & J. 140.

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SPICER and Another v. TODD.

The assignee of an insolvent debtor cannot bring an action for rent against the tenant of premises, in which the insolvent has a life interest, in the names of the trustees of those premises, without their consent, or the offer to them of a sufficient indemnity against costs.

The Court may rescind a Judge's order, though not made a rule of Court.

AN insolvent debtor, named *Pinning*, having been entitled to the rents and profits of an estate for life, his assignee tendered an indemnity to the plaintiffs, who were the trustees of the property, and brought an action in their name against the tenant for rent. Upon an affidavit, that the action was brought against the consent of the plaintiffs, a Baron at chambers set aside the proceedings for irregularity, with costs to be paid by the attorney. The order was not made a rule of Court. A rule for rescinding this order was obtained on the authority of *Chambers v. Donaldson* (a), which it was contended shewed that the assignee might use the names of the plaintiffs, and that their only course was to apply to stay the proceedings until they were indemnified against the costs. It was also contended, that a Judge at chambers had no authority to give costs.

Platt shewed cause, and contended, that the motion could not be supported, because the order had not been made a rule of Court.

The Court overruled this objection.

Platt then admitted that he could not support that part of the order which directed the payment of costs, but contended, upon the merits, that the assignee was not entitled to use the names of the plaintiffs without their consent, and expose them to the peril of costs.

Archbold supported the rule, and contended that the plaintiff should apply to the Court to stay proceedings un-

(a) 9 East, 471.

til they were sufficiently indemnified. If this rule were discharged, the assignee would have no remedy but in equity. In ejectment it was the constant practice to use the names of persons in whom the legal estate was; and yet lessors of the plaintiff were liable to costs.

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Per Curiam.—In the case of *Chambers v. Donaldson*, the plaintiff, who was a *feme coverte*, could only obtain redress for a trespass committed in her house, in which she lived separately from her husband, by using his name; and Lord *Ellenborough* said, that the defendants were colluding with the husband to protect their own wrong. But, what right have you to commence this action without the approbation of the trustees? You should at least shew an application to them, and the offer of a sufficient indemnity before the action was commenced. The Baron's order, and all proceedings in the action, must be stayed, until the plaintiffs are indemnified to the satisfaction of the Master. The rule will then be absolute.

Rule accordingly (a).

(a) This case is also reported in 2 C. & J. 165. See *Brown v. Wright*, *ante*, p. 95. It seems to have been taken for granted in this case, that a Judge at Chambers has no power to grant costs; but there appears to be a difference of opinion among the Courts on this subject. The Court of King's Bench were of opinion in *Read v. Lee*, (2 B. & Adol. 415; S. C. *Anon.* *ante*, p. 52), that a Judge at Chambers has no power to grant costs; but the *Common Pleas*, in

Doed. Prescott v. Roe (9 Bing. 104, and *ante*, p. 274), was of opinion, that a Judge has such a power. It is to be observed, however, that the Court of C. P. took time to consider; while in the *Exchequer* the attention of the Court was not called to the point; and the Court of K. B. stopped *Tomlinson*, who contended that no such power existed. See the language of Lord *Tenterden* in this latter case, *ante*, p. 52.

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FIELD *v.* BEARCROFT.

In order to enter up judgment on an old warrant of attorney, it is not sufficient that the subscribing witness should sign the affidavit of execution in the character of the commissioner before whom it was sworn, but he must make affidavit also.

HENDERSON moved to enter up judgment on a warrant of attorney more than a year old. There was an attesting witness to the execution who did not join in the affidavit, but signed his name to it as the commissioner before whom it was sworn.

Per Curiam.—That at most is only an assertion, not an oath. The affidavit is insufficient.

Rule refused (*a*).

(*a*) This case is also reported in 2 C. & J. 217. See 1 Reg. Gen. H. T. 2 W. 4, s. 73, *ante*, p. 192.

SMYTH *v.* PARSLOW.

It is not sufficient in applying for judgment as in case of a nonsuit, to state that the plaintiff replied, and that the cause is thereby at issue, but it must be sworn without qualification that the cause is at issue.

HEATON moved for judgment as in case of a nonsuit. The affidavit on which he moved stated that special bail was put in in *Easter* Term; that the plaintiff declared in *Easter* Term; that the defendant pleaded in *Trinity* Term; that a rule to reply was duly given; that the plaintiff replied in *Trinity* Term; and that the cause was “thereby at issue.”

Per Curiam.—The cause would only be at issue if the replication were the *similiter*. It should be sworn in the usual way that the cause “is at issue.” The affidavit must be resworn.

Rule refused (*a*).

(*a*) This case is also reported in 2 C. & J. 217.

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GRAHAM v. BROWNE.

A RULE *nisi* was obtained for entering a suggestion on the roll to deprive the plaintiff of his costs, pursuant to the 45 Geo. 3, c. lxxvii, the *Bath* Court of Requests' Act, on the ground that the plaintiff had recovered a verdict for less than 10*l*. The action was brought against the defendant as acceptor of a bill of exchange for 8*l*. 16*s.*, dated *London*, and indorsed by *King*, the drawer, who resided in *London*, to the plaintiff, who also lived in *London*, for a debt arising in *London*, and accepted, payable at a *London* banker's. The defendant resided at *Bath*, within the jurisdiction of the Court of Requests there.

Where a plaintiff recovers less than 10*l*. in a transitory action against a plaintiff resident within the jurisdiction of the *Bath* Court of Requests' Act, the defendant is entitled to enter a suggestion to deprive the plaintiff of his costs, although plaintiff resides in *London*, and the cause of action did not arise within the local jurisdiction.

John Williams and *Comyn* shewed cause, and contended that the case of *Baildon v. Pitter* (a), in which the Court of *King's Bench* came to a decision in support of a rule similar to the present, required consideration.

Kelly, in support of the rule, was stopped by the Court.

Per Curiam.—There is no difficulty in the construction of this act, whatever may be its policy; the one clause takes away the costs where a party sues in another Court for a cause of action recoverable in the *Bath* Court of Requests; the other enacts, that the debts shall be recoverable there, though the plaintiff reside out of the jurisdiction. Under these circumstances we are bound by the plain words of the statute.

Rule absolute (b).

(a) 3 B. & Ald. 210.

(b) This case is also reported in 2 C. & J. 327. And see *Meredith*

v. *Drew*, 8 Bing. 141; and *Mackey v. Goodden* and Others, *post*.

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ILSLEY, Executor, v. ILSLEY.

When process is general, and the affidavit of debt is made by the plaintiff as executor, it is no variance.

BALL shewed cause against a rule for cancelling the bail-bond in this case, on the ground of a variance between the affidavit of debt, which was made by the plaintiff as executor, and the process, which was general.

Chilton, in support of the rule, cited 1 *Tidd, Prac.* 147, ed. 9; *Spalding v. Mure* (a), *Stables v. Ashley* (b), and *Chapman v. Eland* (c). He endeavoured to distinguish the case of *Ashworth v. Ryal* (d), from the present.

Per Curiam.—In *Ashworth v. Ryal*, the correct rule is stated, *viz.* that, upon general process, the plaintiff may declare *qui tam*, or *in autre droit*, as executor, which rule was adopted and acted upon by the Court. That case is, therefore, decisive of the present.

Rule discharged (e).

(a) 6 T. R. 363.

(b) 1 B. & P. 49.

(c) 2 N. R. 82.

(d) 1 B. & Adol. 19.

(e) This case is also reported in

2 C. & J. 330. See *The Weavers'*

Comp. v. Forrest, 2 Str. 1232;

Marzetti v. Comte du Jouvffroy, *ante*,

p. 41; and — *Exors. v. —*,

ante, p. 97.

JAMES, Gent., one &c. v. CHILD.

When full particulars of a plaintiff's demand would exceed three folios, the Court will compel the plaintiff to deliver to the defendant full particulars of his demand, the defendant paying the costs of those particulars, and, if necessary, taking short notice of trial.

THE plaintiff, in obedience to 6 *Reg. Gen. T. T.* 1 *Will.* 4 (a), had delivered with his declaration, a notice that the

defendant full particulars of his demand, the defendant paying the costs of those particulars, and, if necessary, taking short notice of trial.

(a) *Ante*, p. 103.

full particulars of his demand would exceed three folios, and stated generally, that his demand was for 58*l.* 1*s.* 1½*d.*, for conveyancing between the 1st of *January*, 1822, and the 1st of *January*, 1830. A summons for further particulars was attended before a Baron, and on that occasion the statements on each side were so contradictory that no order was made.

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Chilton moved for a rule *nisi* for further particulars, and contended, that, in all cases, according to the spirit of the new rule, full particulars should be delivered if required by the defendant, whether he had previously had an account rendered or not; and that the restriction to three folios was intended for the benefit of the defendant, who was not to be put to the expense of a longer particular, if he had already a full account in his possession.

BAYLEY, B., and VAUGHAN, B., said, they had granted such applications at Chambers upon the terms of the defendant paying the costs of the particulars, and, if necessary, taking short notice of trial. It might be that the defendant had had the particulars of the account and mislaid them.

A rule *nisi* was granted upon the above terms, and cause afterwards shewn by *E. V. Williams*.

Per Curiam.

Rule absolute (a).

(a) This case is also reported in 2 C. & J. 252.

1831.

Service of declaration in ejectment.

A declaration in ejectment may be served upon the wife of the tenant in possession of the premises, if she is living with her husband at the time.

DOE *d.* BRIGGS *v.* ROE.

GODSON moved for judgment against the casual ejector on an affidavit, stating that the party who was to serve the declaration in ejectment went to the dwelling-house sought to be recovered; the outer door was locked; he knocked repeatedly; a servant maid came into the shop; he explained to her the object of his coming, and requested her to open the door, that he might serve her master (the tenant in possession); she refused to open the door or receive the declaration; upon which he nailed the declaration and notice to the door, and departed. On the following day, before the first day of term, the wife of the tenant in possession came to the same person and requested to know what she was to do with the paper which she produced. He explained what it was, and recommended her to go to the attornies of the lessor of the plaintiff. She said she would see her husband immediately, and he recommended her to do so.

Per Curiam.—It amounts to nothing more than an admission by the wife, that she had received the paper. There is nothing to shew that the husband was in the house. If you had shewn that the husband was at home, or if you had served the wife when she called, it might have been sufficient. It is not necessary that the wife should be upon the premises when she is served, provided it appears by affidavit that she is living with her husband at the time.

Rule refused (*a*).

(*a*) This case is also reported 765; 2 B. & P. 55; 1 Chit. Rep. in 2 C. & J. 202. See *Anon.* 1 499; 1 N. R. 308; 1 Chit. Rep. Chit. Rep. 500, n.; and 6 T. R. 228; 2 Wils. 263.

1831.

JONES v. JONES.

JOHN JERVIS obtained a rule *nisi*, requiring the plaintiff to shew cause why he should not give security for costs, and that in the mean time proceedings be stayed. The defendant resided abroad, out of the jurisdiction of the Court. No application for security for costs had been made to the plaintiff's attorney or agent. It did not appear from the affidavits in what stage the proceedings were; and no notice of the motion had been given.

The Court will compel a plaintiff resident out of the jurisdiction to give security for costs, although no previous application has been made to the plaintiff's attorney, or notice of the motion given. But without such application or notice, the rule *nisi* will not stay proceedings.

R. V. Richards shewed cause, and cited *Bass v. Clive* (a).

Per Curiam.—The rule should not have been drawn up with a stay of proceedings, without an affidavit that application had been made for security, or that notice of the motion had been given. If the plaintiff is out of the jurisdiction of the Court, the defendant is entitled to have security for costs; unless the plaintiff shews by affidavit that the proceedings are in such a stage as to deprive him of that right. The defendant makes the application at his peril, and it rests with the plaintiff to shew that the application is too late.

The stage of the proceedings at the time of the motion need not be stated by the defendant; it is for the plaintiff to shew that it is too late.

Rule absolute, the costs to be costs in the cause (b).

(a) 3 M. & S. 283.

(b) This case is also reported in 2 C. & J. 207. See *Wilson v. Minchin*, ante, p. 299; *Anonymous*,

ante, p. 300; *Baile v. De Bernales*, 1 B. & Ald. 331; *Hancock v. Smith*, 2 Chit. Rep. 150; and 1 Reg. Gen. H. T. 2 W. 4, s. 98, ante, p. 196.

1831.

DOE *d.* SNAPE *v.* SNAPE and Others.

Where a person has entered an appearance in ejectment, and become a party to the consent rule, but swears he is in possession of no part of the premises in question, the Court will allow his name to be struck out of the appearance and consent rule on his undertaking to permit execution to issue for any part of the premises of which he may be in possession.

MANNING moved to strike out the name of *Butler* from the appearance and consent rule, upon an affidavit which stated that he was in possession of no part of the premises sought to be recovered. The declaration and notice had been served upon *Butler* and three other persons, and the affidavit stated a service upon the four, as tenants in possession. The rule for judgment against the casual ejector was moved on the last day of *Michaelmas* Term, and an appearance entered for all the defendants, in order to prevent the plaintiff from signing judgment.

Per Curiam.—*Butler's* name may be struck out as prayed, provided he will enter into an undertaking to permit execution to issue for any part of the premises of which he may be in possession.

Rule absolute in the first instance (a).

(a) This case is also reported in 2 C. & J. 214.

NEALE *v.* SWIND.

If one part of a document has been lost, the party holding the other part, or his attorney, if he holds it, may be compelled to produce it at the Stamp Office, to be stamped, though not held on any trust for the party applying.

ROTCH moved to rescind that part of a Baron's order which directed the defendant's attorney to produce at the Stamp Office, for the purpose of being stamped, an instrument, of which two parts had been executed, but the plaintiff had lost his part. The present case did not fall within that class of cases in which the Courts had ordered an inspection, because the defendant held it as his own instrument, and not under any trust or duty to produce it. Besides, it was now confidentially in the hands of the attorney.

Per Curiam.—The attorney's holding is not confidential. We should enforce the production of it at the Stamp Office, for the purpose required, from the party himself. It is essential for the purposes of justice that we should do so; as the production of this instrument unstamped at the trial would exclude all other evidence. The party does not want to see the instrument, but he wishes to put it in such a condition, that, when produced at the trial, if he has given notice to produce it, he may not be nonsuited by its production.

1831.

NEALE
v.
SWIND.

Rule refused (a).

(a) This case is also reported in *Goring*, 4 Bing. 152; S. C. 12 2 C. & J. 278. See also *Street v. Brown*, 6 Taunt. 302; S. C. 1, Marsh. 610; *Ratcliffe v. Pleasby*, 3 Bing. 148; S. C. 10 J. B. Moore, 523; Lord *Portman v. Goring*, 4 Bing. 152; S. C. 12 J. B. Moore, 363; *Blakey v. Porter*, 1 Taunt. 386; *King v. King*, 4 Taunt. 666; *Pickering v. Noyes*, 2 D. & R. 386; and *Doe d. — v. Slight*, ante, p. 163.

NEWTON v. MAXWELL.

KELLY shewed cause against a rule obtained by *John Jervis*, why the defendant, who had been arrested by the name of *William Henry Maxwell*, should not be discharged out of custody, on the ground that the defendant's name was *William Hamilton Maxwell*. It appeared that he had on one occasion signed with the initials of his Christian name, *W. H.*, and with his surname an agreement between *William Henry Maxwell* of the one part, and *C. B.* of the other part; that the defendant had on one occasion told the plaintiff that his name was *William Henry Maxwell*, and that the plaintiff had known the defendant for five years by that name only.

Where a person named *Wm. Hamilton M.* was arrested by the name of *Wm. Henry M.*, and he had signed an agreement with the initial letters *W. H.*, and had once told the plaintiff that his name was *Wm. Henry M.*, the Court would not discharge him on motion.

John Jervis supported the rule, and cited *Walker v.*

1831.

NEWTON
v.
MAXWELL.

Willoughby (a), *Maestier* q. t. v. *Hertz* (b), *Macbeath* v. *Chatterley* (c), and *Scott* v. *Soans* (d).

Per Curiam.—We are of opinion, that this rule ought to be discharged, with costs. If a party will countenance another person in calling him by a name which is not his name of baptism, he is not to complain of it.

Rule discharged, with costs (e).

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|---------------------------------------|---|
| (a) 2 Marsh. 230; S. C. 6 Taunt. | v. <i>Barker</i> , ante, p. 125, and 1 Reg. Gen. H. T. 2 W. 4, s. 32; ante, |
| 530. | p. 187. |
| (b) 3 M. & S. 450. | (e) This case is also reported in |
| (c) 2 D. & R. 237. | 2 C. & J. 215. |
| (d) 3 East, 11. See also <i>Ogden</i> | |

Hilary Term.

IN THE SECOND YEAR OF THE REIGN OF WILLIAM IV.

1832.

AMPTHILL v. SEMPLE.

If a plea is delivered after the time for pleading is out, but before judgment signed, of which the plaintiff's attorney is apprized, and he afterwards signs judgment, it is irregular, and the plaintiff's attorney must pay the costs of the application to set it aside.

IN this case the time for pleading had expired, and the day after the defendant's attorney went to the office of the plaintiff's attorney, and delivered a plea to a clerk in the office. He then went to the Judgment-office, where he found the plaintiff's attorney, who had not signed judgment. He told the latter that a plea had been delivered; and, therefore, that he could not sign judgment. The plaintiff's attorney, however, did sign judgment.

Steer obtained a rule to set aside this judgment for irregularity, with costs to be paid by the plaintiff's attorney.

Alexander shewed cause.

Per Curiam.—The plaintiff's attorney signed judgment, with full knowledge that the defendant had pleaded. If the plea be pleaded before judgment is signed, it is regular; and, therefore, signing judgment afterwards is an irregularity. The rule must, therefore, be made absolute, as prayed.

Rule absolute, with costs to be paid by the plaintiff's attorney (a).

(a) This case is also reported in 2 C. & J. 358.

1832.
AMPTHILL
v.
SEMPLER.

GLASCOTT v. CASTLE.

KNOWLES obtained a rule *nisi* for taxing the plaintiff's attorney's bill of costs, which had been paid by the sheriff, on making absolute a rule for an attachment for not bringing in the body.

Hoggins shewed cause, and contended, that where an attorney's bill of costs had been paid, it was only under circumstances of fraud or imposition, that the Court would interfere to direct an attorney's bill to be taxed.

Where an attorney's bill has been paid, the Court will refer it to be taxed by the Master, on application within a reasonable time, without shewing circumstances of fraud or imposition.

BAYLEY, B.—That depends on the time within which the application is made. If made within a reasonable time, Judges at Chambers are in the habit of directing taxation in such cases, as a matter of course. If there has been any delay, then the party applying to tax the bill must shew fraud or imposition. Here, as the Sheriff has paid the costs, he is fairly entitled to have the bill taxed by the Master.

Rule absolute (a).

(a) This case is also reported in 2 C. & J. 355. See *Draz v. Scroupe*, ante, p. 69.

1832

KIRK v. ALMOND.

Reported 2 C. & J. 254. 2. 729. 216.

It is necessary in an affidavit of debt on a promissory note to state when the note is payable, or that it is overdue.

If an affidavit of debt on several promissory notes is defective as to some of them, the Court will discharge the defendant on filing common bail, and will not order bail to be taken to the amount of the note, as to which the affidavit is sufficient.

CRESSWELL shewed cause against a rule for discharging the defendant out of custody, on filing common bail, on the ground of the affidavit of debt being insufficient. The affidavit stated that the defendant was indebted to the plaintiff on three promissory notes for certain sums. No statement was made in the affidavit as to when the two last notes were payable, or that they were overdue and unpaid. He contended that it must be presumed, if no time were specified, that the notes were payable on demand. The statement that the defendant was justly and truly indebted, was a sufficient allegation that they were overdue and unpaid. But, supposing the affidavit to be bad as to the two last notes, it was good as to the first note, and, therefore, the defendant ought to give bail for its amount, and the interest due on it.

Humfrey supported the rule, and cited *Jackson v. Yate* (a).

Per Curiam.—The defendant is in substance alleged to be indebted, by virtue of three several instruments. The presumption is, that the defendant was arrested for the sum sworn to, and that he is now in custody for that amount. For part of that amount the affidavit shews no right to arrest; and, as we are aware of no instance in which an affidavit of debt, bad in part and good in part, has been upheld as to the good part, the defendant must be discharged on filing common bail.

Rule absolute (b).

(a) 2 Mau. & Sel. 148.

(b) This case is also reported in 2 C. & J. 354.

1832.

LEWIS v. GOMPERTZ.

IN this case the affidavit of debt stated that the defendant was indebted to the plaintiff in the sum of 100*l.* as indorsee of a bill of exchange, without stating the amount of the bill, or by whom it was indorsed, but merely that it was *duly* indorsed to the plaintiff. A rule for discharging the defendant out of custody on filing common bail having been obtained, cause was shewn against it.

In an affidavit of debt on a bill of exchange, it is not necessary to state the amount of the bill.

In an affidavit of debt by an indorsee of a bill of exchange it must be stated by whom the bill was indorsed; it is insufficient to state that it was *duly* indorsed.

Per Curiam.—There is nothing in the objection that the amount of the bill is not stated in the affidavit of debt. As to the other objection, the affidavit ought to state by whom the bill was indorsed. The allegation *duly* indorsed is a mere inference. We should see on the face of the affidavit by whom it was indorsed.

Rule absolute (a).

(a) This case is also reported in *S. C.* 4 Bing. 114; *Bosunquet v. 2 C. & J.* 352. See also *M'Taggart v. Ellice*, 12 J. B. Moore, 326; *Phillis*, 4 Mau. & Sel. 430; and *Hanley v. Morgan*, *post*, p. 322.

NOTTS v. CURTIS.

MILLER shewed cause against a rule *nisi*, obtained by the defendant for changing the venue from *Lincoln* to *Nottingham*. He produced an affidavit, stating that the defendant had, before obtaining this rule, taken out a Judge's order for further time to plead, "on the usual terms." He cited 1 *Tidd's Prac.* 609, ed. 9; *Dax's Prac.* 60; *Waring v. Holt* (a), and *Brittargh v. Dearden* (b),

After an order for time to plead, "on the usual terms," either in town or country causes, the defendant cannot change the venue, whether the trial will be delayed or not by such change.

(a) 3 Price, 3.

(b) M'Clel. & Younge, 106.

1832.

NOTTS

v.

CURTIS.

to shew that the defendant, after taking out such an order, could not change the venue.

Power, in support of the rule, contended that those decisions only applied to town causes and not to country causes; besides, in those cases changing the venue would delay the trial. Here no such consequence would ensue.

Per Curiam.—The cases referred to are certainly town causes; but the Court, in *Waring v. Holt*, laid down the rule as general; and it appears always to have been so understood in this Court. If any inconvenience was likely to arise in the present case, the defendant might have introduced into the order the words “without prejudice to an application to change the venue.” The omission of those words makes the objection good; but as the plaintiff will not be delayed, we may direct the order to be amended in that respect.

The order was amended on payment of costs, and the rule made absolute for changing the venue (a).

(a) This case is also reported in 2 C. & J. 345. See also 1 Reg. Gen. H. T. 2 Will. 4, s. 103, *ante*, p. 197.

NOLLEKEN v. SEVERN.

If a defendant pleads irregularly, the plaintiff is not therefore entitled to sign judgment before the time for pleading is out.

ARCHBOLD shewed cause against a rule obtained by *Follett*, for setting aside the judgment in this case on the ground of irregularity. On the 17th of *January*, notice of declaration was served on the defendant, indorsed to plead in eight days. On the 21st, he pleaded without having entered an appearance. The plaintiff treated the

plea as a nullity, and signed judgment on the same day. He cited *Lockhart v. Macreuth* (a), *Perry v. Fisher* (b), *Brandon v. Pyne* (c).

1832.
NOLLEKEN
v.
SEVERN.

Follett supported the rule.

Per Curiam.—The case of *Brandon v. Pyne* only determined that the defendant, by pleading in abatement, after the four days, dispensed with a rule to plead. The judgment here was signed too soon, and, therefore, the rule must be made absolute.

Rule absolute (d).

(a) 5 T. R. 663.

(b) 6 East, 549.

(c) 1 T. R. 689.

(d) This case is also reported in
2 C. & J. 333.

LEYLES v. CHETWOOD.

SAUNDERS obtained a rule for staying proceedings on the bail bond. His affidavits were intitled in the action against the bail. The clerk of the rules refused to draw up the rule, on the ground of the affidavits being so intitled. They were accordingly amended, and on renewing the motion, the objection and correction were mentioned.

To support a motion for staying proceedings on a bail bond, the affidavits may be intitled either in the original action, or in the action against the bail.

Per Curiam.—The affidavits would have been well intitled in either the original action or the action against the bail (a).

(a) This case is also reported in 2 C. & J. 332. See also *Ham v. Philcox*, 7 Moore, 521; *S. C.* 1 Bing. 142; *Robert v. Giddins*, 1

B. & P. 337; *Webb v. Mitchell*, 1 Tid. Prac. 304, ed. 9; and *Kelly v. Rother*, 2 Chit. Rep. 109.

1832.

HANLEY v. MORGAN.

In an affidavit to hold to bail on a bill of exchange, it is not necessary to express the sum for which the bill was drawn.

CHANNELL moved for a rule *nisi* why the bail bond in this case should not be delivered up to be cancelled, on the ground of a defect in the affidavit of debt. The plaintiff, as indorsee, had arrested the defendant as acceptor of a bill of exchange, and the affidavit of debt stated that the defendant was indebted to the plaintiff in the sum of 263*l.* 15*s.*, but did not disclose the sum for which the bill was drawn.

BAYLEY, B., having taken time to consider, said—I have looked into the authorities upon the subject; and it appears to me sufficient to allege in the affidavit, that the defendant was indebted to the plaintiff in a sum certain upon a bill of exchange, without stating the amount for which the bill was drawn. If a rule be granted, it will probably be discharged.

Channell elected to take no rule (a).

(a) This case is also reported in 2 C. & J. 331. See *Lewis v. Gomperts*, ante, p. 319.

HEWS v. PYKE.

If money is deposited in Court in lieu of bail above, pursuant to the 7 & 8 Geo. 4, c. 71, and the plaintiff obtains a verdict, he must limit his execution to the surplus of his demand, beyond the sum deposited.

THE defendant in this case had paid into Court the amount of the plaintiff's demand, with a further sum of 20*l.*, as an additional security for the costs of the action, pursuant to the 7 & 8 Geo. 4, c. 71, s. 2, in lieu of perfecting special bail. The plaintiff recovered a verdict, taxed his costs, and issued execution for the whole amount of his damages and costs, without noticing the sum paid into Court. The case was referred to the Master, who reported on the principle that the plaintiff had no right to

issue execution for the whole amount of damages and costs, but was bound to take the sum deposited out of Court, and levy for the remainder only.

1832.

Hews
v.
Pyrke.

Crowder moved that the Master might be directed to review his report, as the statute was not compulsory on the plaintiff to take the money deposited out of Court.

Follett shewed cause in the first instance.

Per Curiam.—The statute of the 43 *Geo.* 3, c. 14, and the 7 & 8 *Geo.* 4, c. 71, which were intended for the benefit of defendants subject to arrest, would effect a great hardship if a plaintiff might pass by the money paid into Court, and issue execution for the whole sum recovered, and the costs. Suppose the case of a person arrested for 1000*l.*, he would be put to the inconvenience of raising that amount to pay into Court, and, after verdict, of finding a like sum to meet the execution, or of suffering his goods to be sold by the Sheriff, and afterwards of waiting until an order could be obtained to have the money paid to him out of Court. To the plaintiff no hardship can accrue, as he can obtain the money out of Court at any time, and would be entitled to the costs of taking it out. The just interpretation of the direction in the act, that the sum deposited shall remain in Court "to abide the event of the suit," is, that the plaintiff, if he succeeds, shall not be *entitled* only, but *bound* to resort to that in the first instance, and can issue his execution for the surplus only.

Rule refused (*a*).

(*a*) This case is also reported in 2 C. & J. 359. See *Ferrall v. Alexander and Another*, *ante*, p. 132.

REPORTS OF CASES
DETERMINED IN
THE PRACTICE COURT

OF THE

Court of King's Bench,

IN EASTER TERM,

IN THE SECOND YEAR OF THE REIGN OF WILLIAM IV.

1830.

MICH. TERM.

Ex parte HART, Gent., one &c., in the Matter of TOVERY
v. PAYNE and Another (a).

Where the amount of damages sought to be recovered in an action is unliquidated, the parties may compromise, without regard to the plaintiff's attorney's claim to costs.

THIS was an action against a constable and overseer for an excessive distress for poor rates. After plea pleaded, the plaintiff's attorney gave notice to the defendants not to settle the action without his (the attorney's) consent; the plaintiff, however, was induced by the defendants, for certain considerations, to give them a general release, which they pleaded *puis darrein continuance*. A rule was obtained, calling on the defendants to shew cause why they should not pay the plaintiff's costs to *Hart*, his attorney, on the ground, that the defendants had no right, by compromising the action, to deprive the plaintiff's attorney of his lien for costs. Cause was shewn against this rule.

(a) This and the eleven following cases, which were decided before the four Judges of the *King's*

Bench, in the respective Terms mentioned in the margin, were unavoidably omitted in the last Part.

Per Curiam.—This case is distinguishable from those in which the amount of damages is ascertained. Here, they are unliquidated. This rule must be discharged.

1830.

HART
v.
PAYNE.

Rule discharged (a).

(a) See *Welsh v. Hole*, Dougl. and 1 Reg. Gen. H. T. 2 W. 4, s. 238; *Read v. Dupper*, 6 T. R. 3. This case is also reported in 361; *Swain v. Senate*, 2 N. R. 99; 1 B. & Adol. 660. *Chapman v. Haw*, 1 Taunt. 41;

MORRISON v. SUMMERS.

MICH. TERM.

IN this case the plaintiff's attorney, who resided in *London*, wrote, on the 10th *April*, to the defendant, who resided in *Somerset*, demanding payment of a debt, and 5*s.* for his letter. In answer the defendant wrote, that he would remit the amount in a fortnight. The attorney replied, on the 14th, that if the debt were paid on the 21st, no further expense would be incurred; but, at the same time, demanded 13*s.* 4*d.* for his costs. The defendant on the same day, before he received the second letter, remitted the debt to the plaintiff, and on the day following it was received by the latter, and a receipt given. In order to secure payment of his costs, the attorney, on the day the money was received by the plaintiff, sued out a writ. Learning afterwards that the plaintiff had been paid, he informed the defendant that unless the sum of 1*l.* 1*s.* was paid to him, he should proceed in his action for costs, at the same time informing him, that he should not charge for the writ, if the money and costs at first demanded were paid. As the defendant refused to pay those costs, the attorney proceeded with the action. A rule *nisi* to stay proceedings was obtained, and cause shewn against it.

An attorney is entitled to his costs for writing a letter demanding a debt from a defendant before writ issued.

1830.

MORRISON
v.
SUMMERS.

Per Curiam.—The defendant, by remitting the amount of the debt to the plaintiff instead of his attorney, was guilty of a breach of good faith. If a writ had issued before payment of the debt, the attorney might have charged for the costs of the writ, and 6*s.* 8*d.* for instructions. The proceedings can only be stayed on the terms of paying 13*s.* 4*d.*, and the costs of the application.

Rule absolute accordingly (a).

(a) This case is also reported in 1 B. & Adol. 559.

1831.

HILARY TERM.

COLLINS v. GODEFROY.

A witness attending the trial of a cause on subpoena cannot maintain an action for compensation for his loss of time in attendance.

THIS was an action brought by the plaintiff to recover compensation for his loss of time, in attending as a witness in the case of *Godefroy v. Dalton*, in the *Common Pleas*, in which he had been subpoenaed. He attended six days, but was not called. The Jury found for *Godefroy*, but the verdict was afterwards set aside. *Collins*, an attorney, the plaintiff in the present action, demanded six guineas from *Godefroy*, as his fee for attendance; which not being paid, he brought his action for that sum. The defendant applied to this Court to stay proceedings, on payment of six guineas without costs; and the rule was made absolute, on condition that the defendant paid six guineas, together with the costs of the cause and of the application. The defendant did not pay the six guineas or the costs, but pleaded the general issue. At the trial the plaintiff was nonsuited, with leave to move to enter a verdict for six guineas. A rule *nisi* to that effect having been obtained—

Kelly shewed cause.—He cited *Bridge v. Cage* (a),

(a) Cro. Jac. 103.

Morris v. Burdett (a), *Dew v. Parsons* (b), *Willis v. Peckham* (c), *Moor v. Adam* (d), and referred to the language of the 5 *Eliz.* c. 9, s. 12.

1831.
COLLINS
v.
GODEFROY.

Campbell and *Collins* supported the rule.—They distinguished the cases relied on by the other side, and cited *Severn v. Olive* (e), *Lopez v. De Tastet* (f), and *Schimmel v. Lousada* (g).

Cur. adv. vult.

LORD TENTERDEN, C. J.—If we assume, that the offer to pay the six guineas by the defendant was evidence of an express promise by him to pay that sum as a compensation to the plaintiff for his loss of time, and the defendant was not bound by law to pay it, his offer so to do, not having been accepted, will be of no avail to the plaintiff; as it is a duty which the law imposes upon persons regularly subpœnaed, to attend and give their evidence, a promise to remunerate for loss of time caused by such attendance is without consideration. It is a duty imposed by law so to attend; and, after considering the stat. of *Eliz.*, and the cases decided on this subject, we are all of opinion, that a party cannot maintain an action for compensation for loss of time in attending a trial as a witness under a subpœna. A practice has prevailed in certain cases, of allowing as costs between party and party, a certain sum *per day* for the attendance of professional men; but that practice cannot alter the law. We are not to consider what may be the effect of our decision. This rule must be discharged (h).

(a) 1 Camp. 218.

(b) 2 B. & Ald. 562.

(c) 1 B. & B. 515.

(d) 5 Mau. & Sel. 156.

(e) 3 B. & B. 72.

(f) 3 B. & B. 292.

(g) 4 Taunt. 695.

(h) See *Sturdy v. Andrews*, 4 Taunt. 697; *Berry v. Pratt*, 1 B. & C. 276; *S. C.* 2 D. & R. 424; *Tremaine v. Faith*, 1 Marsh. 563; *S. C.* 6 Taunt. 88; *Lonergan* and

1831.

EAST. TERM.

WORTH and Another v. BUBB, PAIN, and ODELL.

The 6 Geo. 4, c. 16, s. 44, which grants double costs to successful defendants, who have acted under the authority of that stat., does not apply to assignees, or those acting under their authority.

THIS was an action of trespass brought against the defendants for certain trespasses, alleged to have been committed by them under the authority of a commission of bankrupt, issued against a person named *Swannell*. The two first defendants were assignees under the commission, and the last defendant acted under their authority. No warrant was either proved or admitted to have been granted to him by the commissioners. A verdict having been found for the defendants, a rule *nisi* was obtained for entering a suggestion on the roll, to give the defendants double costs, under the 6 Geo. 4, c. 16, s. 44.

Biggs Andrews shewed cause, and cited *Carruthers v. Payne* (a), and *Edge v. Parker* (b).

Campbell and *Dodd*, in support of the rule, contended, that, as the two cases cited were decided on the first part of the section, they were not authorities in this case, which depended on the meaning of the latter part of the section.

Per Curiam.—In the two cases cited, it has been decided, that the first part of sect. 44 does not apply to actions against assignees. There is no ground, then, for saying that the latter part of the section applies to such actions. The defendants, therefore, who are assignees, are not entitled to double costs. As to the defendant *Odell*, he having acted by authority of the assignees, without any

Another v. The Royal Exchange Assurance Company, *ante*, p. 223; S. C. 5 M. & P. 447, 7 Bing. 725; *Theilsson v. Staples*, Doug. 438; and *Temperley v. Scott*, *post*, and

8 Bing. 392. This case is also reported in 1 B. & Adol. 950.

(a) 2 Moore & P. 429; S. C. 5 Bing. 270.

(b) 8 B. & C. 697.

warrant from the commissioners, must be considered as standing in the same situation as the assignees, and, therefore, no more entitled than they are to double costs.

1831.
WORTH
v.
BUBE.

Rule discharged (a).

(a) This case is also reported in 2 B. & Adol. 177.

NEWMAN and Another v. HODGSON.

EAST. TERM.

A RULE *nisi* was obtained in this case for paying out to the plaintiffs, with costs, the sum of 60*l.*, deposited in the hands of the Sheriff, together with 10*l.* for costs in lieu of bail, pursuant to the 43 *Geo. 3*, c. 46, s. 2, and since paid into Court, on the ground that the defendant had not put in and perfected bail in due time. It appeared that the defendant had been rendered since the rule *nisi* was obtained.

A plaintiff is entitled to have money paid into Court in lieu of bail, paid out to him, if special bail be not perfected in due time, although the defendant has rendered since the time for perfecting bail, unless an affidavit of merits is produced

F. Pollock shewed cause, but produced no affidavit of merits.

Busby supported the rule, and cited *Parker v. Turner* (a).

Per Curiam.—The render in this case was not in due time, and no affidavit of merits on the part of the defendant is produced; the plaintiffs have, therefore, a right to have the money paid out of Court to them. This case is analogous to an application for the stay of proceedings in an action on a bail-bond. An affidavit of merits is always required in such cases.

Rule absolute (b).

(a) 2 Chit. Rep. 71.

(b) This case is also reported in 1 B. & Adol. 422.

1831.

TRIN. TERM.

DAGLEY, Gent. one &c. v. KENTISH.

It is a matter of doubt whether the Court has a power, independently of the stat. of the 2 Geo. 2, c. 23, to refer an attorney's bill for taxation, when it contains no taxable item.

THIS was an action for an attorney's bill. It contained no items taxable under the statute; but a rule *nisi* was obtained to refer it to the Master for taxation, by the common law jurisdiction of the Court, to refer an attorney's bill for taxation, independently of the 2 Geo. 2, c. 23.

Sir *J. Scarlett* shewed cause, and contended that the Court had not power to order taxation in such a case.

Gurney, in support of the rule, cited *Wilson v. Gutteridge* (a).

Cur. adv. vult.

Per Curiam.—The practice has, in general, been not to refer attorneys' bills for taxation in which there were no taxable items. It is, however, laid down in 1 *Tidd's Prac.* 327, ed. 9, in which *R. v. Batch* (b), and an *Anonymous* case (c), are cited, and in *Wilson v. Gutteridge*, that the Court has power to refer an attorney's bill for taxation independently of the statute. On consulting the other Judges, there appears so much doubt as to whether such a power does exist, that we cannot refer this bill for taxation.

Rule discharged (d).

(a) 3 B & C. 157; S. C. 4 D. & R. 736.
(b) 9 Price, 349.

(c) 2 Chit. Rep. 155.
(d) This case is also reported in 2 B. & Adol. 411.

1831.

KIDD v. WALKER.

TRIN. TERM.

COVENANT for not paying a sum of money with interest, according to indenture. The defendant paid into Court a sum sufficient to cover the plaintiff's demand, with interest down to the commencement of the action, but not interest down to the time of the payment into Court; and pleaded *solvit ad diem*. The amount of interest accruing in the period between the commencement of the action and the payment into Court was 3*l.* 12*s.* The learned Baron who tried the cause directed the jury to find for the defendant, and gave leave to the plaintiff to move to enter a verdict for 3*l.* 12*s.* A rule *nisi* for that purpose was obtained, and

In an action on a security bearing interest, the defendant cannot support his plea of *solvit ad diem* by proof of payment of a sum into court sufficient to cover the amount of the plaintiff's demand, with interest down to the time of action brought. He should pay in sufficient to cover the amount of interest due at the time of making the payment into Court.

Follett shewed cause.—He cited *Robinson v. Bland* (a), and 1 *Tidd, Prac.* 624, ed. 9.

C. F. Williams and *Coleridge*, who were to have supported the rule, were not called upon by the Court.

Per Curiam.—As a jury is bound to find a verdict according to law, we must suppose, that, if the plaintiff had a legal claim to this sum of 3*l.* 12*s.*, the jury intended to give it. We think he had such a claim. The practice of paying money into Court would work great injustice, if it were to deprive a plaintiff of any part of his demand, which he might otherwise recover. The sum here claimed is certainly very small, but circumstances might occur in which a plaintiff would lose and a defendant save a very considerable amount of interest. Here the defendant has made a slip, but the plaintiff is entitled to take advantage of it.

Rule absolute (b).

(a) 2 Burr. 1077. (b) This case is also reported in 2 B. & Adol. 705.

1831.

TRIN. TERM. In the matter of Arbitration between CHURCHER, Gent., one &c., and STRINGER, Gent., one &c.

Where an award directs the payment of money on a certain day, interest from that day may be recovered by action, but not by attachment.

IN this case, certain matters in difference were referred to an arbitrator, who awarded that *Stringer* should pay *Churcher* a certain sum, on the 24th *November*, 1830. On shewing cause against a rule for an attachment for non-payment of this money, the matter was referred to the Master. He reported, on the 5th *May*, that the whole ought to be paid. It was paid accordingly on the 9th, but *Churcher* claimed interest from the time of payment fixed in the award until the day when the debt was paid. He accepted the principal, however, without prejudice. A rule *nisi* was obtained for an attachment for non-payment of the interest on the principal sum, from the 24th of *November* to the 9th of *May*.

Kelly shewed cause.

Hoggins supported the rule, and cited the Marquis of *Anglesey v. Chafey* (a), and *Pinhorn v. Tuckington* (b), which were both cases in which the Court held that interest on an award was recoverable in an action from the time of making the demand.

Per Curiam.—Interest may certainly be recovered in an action brought upon an award, but not by attachment. The distinction has always prevailed in practice, that both principal and interest may be recovered in an action, but the principal only by attachment.

Rule discharged, without costs (c).

(a) Mann. Dig. Tit. Interest, A.
(a), pl. 19.

(c) This case is also reported in
2 B. & Adol. 777.

(b) 3 Camp. 468.

1831.

VISGER and Another v. DELEGAL.

TRIN. TERM.

IN this case the defendant having been arrested for 1000*l.*, he deposited that sum, with 10*l.* for costs, in lieu of bail, with the Sheriff, pursuant to the 43 *Geo. 3*, c. 46, s. 2. A rule *nisi* was obtained for paying over the sum of 1010*l.* by the Sheriff to the defendant, on filing common bail, on the ground that the affidavit of debt was insufficient. The affidavit stated, "that the defendant was indebted to the plaintiff in the sum of 1000*l.* and upwards, *on balance of account* for money paid, laid out, and expended by the plaintiffs *to and for* the defendant, and at his request, and for money had and received by the defendant for the plaintiffs, and for interest of monies due by the defendant to the plaintiffs."

Where an affidavit of debt stated that the defendant was indebted to the plaintiff in 1000*l.* "on balance of account for money paid, laid out, and expended by the plaintiff, *to and for* the defendant, and at his request, and for money had and received by the defendant for the plaintiff, and for interest of monies due by the defendant to the plaintiff: "—*Held*, not sufficiently certain.

Campbell and *Ashmore* shewed cause.

F. Pollock supported the rule.

Per Curiam.—Without the words, "on balance of account," the affidavit would clearly be bad. Those words, however, only imply that the defendant was originally indebted to the plaintiffs, on the accounts stated in the affidavit, in a larger amount, which has been reduced by a set-off to 1000*l.* The case is therefore left in the same uncertainty as if no balance had been mentioned.

Rule absolute (a).

(a) See 1 Reg. Gen. H. T. 2 Will. 4, s. 8. This case is also reported in 2 B. & Adol. 571.

1831.

TRIN. TERM.

REYNAL, Gent., one &c., v. SMITH, Gent., one &c.

The 3 Jac. 1. c. 7. s. 1, requires attornies to deliver to their clients a signed bill of their fees and charges before charging them:—*Held*, that that provision only applies to business done in the superior Courts of Westminster.

THE plaintiff in this case was an attorney of the Court of *King's Bench* and of the Lord Mayor's Court. The defendant employed him to defend a cause in the latter Court. This action was brought to recover the amount of the plaintiff's charges on that occasion. No signed bill of those charges was delivered by the plaintiff before action brought. The Jury found a verdict for the plaintiff, and—

Follett moved to enter a nonsuit, on the ground that by 3 Jac. 1, c. 7, s. 1, the plaintiff should have delivered a signed bill previous to bringing his action. That act applied to accounts between attornies, though the 2 Geo. 2, c. 23, did not. The 12 Geo. 2, c. 13, s. 6, took them out of the operation of the latter statute, but not out of that of the former. The question then was, whether the clause in the stat. of Jac. applied to charges for business done in inferior Courts. He cited *Brickwood v. Fanshaw* (a), *Ex parte Williams* (b), *Clarke v. Donovan* (c), *Smith v. Watleworth* (d), and *Heming v. Wilson* (e).

Per Curiam.—The 3 Jac. 1, c. 7, s. 1, does not apply to business done in the Lord Mayor's Court by an attorney there, who happens also to be an attorney of a superior Court. The whole section refers to business done in the superior Courts. The first branch of the section is expressly confined to business transacted here; and there is nothing in the latter clause carrying it further. The words "all other charges concerning the suits which they have for them" evidently refer to the suits contemplated in the foregoing part of the section. The only other section contained in

(a) Carth. 147.

(d) 4 B. & C. 364.

(b) 4 T. R. 124, 496.

(e) 1 M. & M. 529.

(c) 5 T. R. 694.

the act relates solely to the admission and practice of attornies in the King's Courts of record at *Westminster*. We are, therefore, of opinion, that the whole of s. 1 is confined to attornies of those Courts, and business done by them there.

1831.
REYNAL
v.
SMITH.

Rule refused (a).

(a) This case is also reported in 2 B. & Adol. 469.

OWEN v. OWEN.

MICH. TERM.

IN this case the defendant was in the custody of the Sheriff on a *quo minus* from the *Exchequer*, when the plaintiff sued out a *test. ca. sa.* against him, which was delivered to the Sheriff. On the following day, he sent down a *ha. cor. ad satisfaciendum*, in order to remove him into the custody of the Marshal. To this the Sheriff made a return, which stated that the defendant was detained under the *Exchequer* process and the *ca. sa.* at the plaintiff's suit.

If a defendant is in custody of the Sheriff, and a *test. ca. sa.* is issued against him, the delivery of the *ca. sa.* to the Sheriff is sufficient to charge him in execution.

Thessiger shewed cause against a rule *nisi* obtained by *Platt*, for remanding the defendant into the custody of the Sheriff.

Per Curiam.—The mere delivery of the *ca. sa.* to the Sheriff was sufficient to charge the defendant in execution at the suit of the plaintiff. The defendant must, therefore, be remanded.

Rule absolute (a).

(a) This case is also reported in 2 B. & Adol. 805.

1831.

MICH. TERM.

Where a defendant in trespass pleads not guilty to the declaration, and suffers judgment by default to a new assignment, but leaves the general issue on the record, the plaintiff being thus compelled to prove his whole case, he will be entitled to the general costs of the cause, although the issue on a special plea covering the declaration has been found for the defendant.

BROADBENT v. SHAW and Others.

TRESPASS for breaking and entering the plaintiff's close. Pleas to the whole declaration—first, not guilty; secondly, a right of way. Replication—issue on the plea of not guilty, traverse of the right of way, and a new assignment *extra viam*. Rejoinder—issue on the traverse of the right of way, and judgment by default to the new assignment. The Jury found for the plaintiff on the general issue, and for the defendants on the issue as to the right of way. The damages assessed on the new assignment were 1s. On taxation, the Master allowed the plaintiff 20l. only for the costs of the new assignment, and the general costs of the cause to the defendants. A rule *nisi* was obtained by *Addison* for reviewing the Master's taxation, on the ground, that, as the general issue was pleaded to the whole declaration, and that plea not withdrawn, the plaintiff was forced to go to trial in order to obtain damages on the judgment by default on the new assignment, and was, therefore, entitled to the general costs of the cause. He cited *House v. The Thames Commissioners* (a), *Longden v. Bourne* (b), *Vickers v. Gallimore* (c), and *Cross v. Johnson* (d).

Blackburne shewed cause.—As the defendants had succeeded on the justification, which covered the whole cause of action, they are entitled to the general costs of the cause; as, where one plea which covers the whole cause of action is found for the defendant, he is entitled to the general costs of the cause. He cited *Vivian v. Blake* (e), *Benett v. Coster* (f), *Othir v. Calvert* (g), *Edwards v. Bethel* (h), and *Booth v. Ibbotson* (i).

Per Curiam.—The question in this case has been settled by the decision in *House v. The Thames Commission-*

(a) 3 B. & B. 117.

(d) 9 B. & C. 613.

(g) 1 Bing. 275.

(b) 1 B. & C. 278.

(e) 11 East, 263.

(h) 1 B. & Ald. 254.

(c) 5 Bing. 196.

(f) 1 B. & B. 465.

(i) 1 Y. & J. 354.

ers, *Longden v. Bourne*, and *Vickers v. Gallimore*. The usual practice has been since those cases, under circumstances like the present, to withdraw the general issue. The rule having been established by those decisions, and the course of practice being in accordance with them, we are bound to hold that the plaintiff is entitled to the general costs of the cause.

Rule absolute (a).

(a) This case is also reported in 2 B. & Adol. 940. See also *Forrester v. Wale*, and *Ruddock v. Smith*, *post*.

1831.

BROADBENT
v.
SHAW.

1832.

April 18th.

GRIMSHAW v. EMERSON.

A*ALEXANDER* shewed cause against a rule obtained by *Channel* for quashing the return of the Sheriff of *Yorkshire* to a *pone* issued in this plaint, removing it into the Court of *King's Bench*; and for an attachment for a contempt in proceeding with the said cause in his county court after the delivery to him of the said writ of *pone*. The affidavits on which the rule had been obtained stated, that a plaint had been entered by *justices* in the county court of the Sheriff of *Yorkshire*, at the suit of the plaintiff, for the recovery of 6l. 1s. 11d.; that a summons thereon was issued, and an appearance entered; that the defendant, on the 22nd of *December* in the same year, issued a *pone*, returnable on the 15th of *January*, 1831, directed to the Sheriff of *Yorkshire*, requiring him to transmit the plaint into the Court of *King's Bench*; that the Sheriff's return was, "I could not execute this writ, the cause therein alleged for the execution thereof not being true." Interlocutory judgment was afterwards signed, a writ of inquiry executed, final judgment signed, and execution issued against the defendant's goods. This application, so far as it concerns the quashing of the return, cannot be resisted, since the recent decision of the Court of *King's Bench* in *Parks v. Renton* in *Hilary Term* last; but so much of it as prays for an attachment, must be discharged.

Where a *pone* has issued for the purpose of removing a plaint out of the county court, and the Sheriff has notwithstanding proceeded with the plaint, the defendant, in order to obtain an attachment against the Sheriff, must shew that the recognizances required by the 19 Geo. 3, c. 70, s. 6, have been entered into by him. The Sheriff's return to the *pone*, "I could not execute this writ, the cause therein alleged for the execution thereof not being true," is bad.

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 GRIMSHAW
 v.
 EMERSON.

The affidavits on the part of the defendant do not shew that any recognizance for payment of debt and costs was entered into on his behalf, as required by the 19 *Geo.* 3, c. 70, s. 6, in order to remove the plaint out of the inferior court. By the 21 *Jac.* 1, c. 23, s. 4, it was provided, "That if in any cause not concerning freehold or inheritance, or title of land, lease, or rent, commenced or depending in any such inferior court of record, it shall appear, or be laid, in the declaration, that the debt, damages, or things demanded, do not amount to or exceed the sum of five pounds, then such cause shall not be stayed or removed by any writ or writs whatsoever, other than writs of error on attain: and if any writ or writs shall be granted or sued forth contrary to the intent and meaning of this act, the judges of the inferior court may disallow and refuse the same, and proceed as if no such writ had been granted or sued forth." Mr. *Tidd* (a) observes, "that, soon after the making of this statute, a method was contrived of removing causes for sums not exceeding five pounds, by setting up an action for a fictitious demand to a larger amount; and then, upon suing out a *habeas corpus*, all the causes were removed together. To defeat this contrivance, it was enacted by a subsequent statute, 12 *Geo.* 1, c. 29, s. 3, "that the judges of such inferior courts as are described in the statute of *James* may proceed in such cases as are therein specified, which appear, or are laid, not to exceed the sum of five pounds, although there may be other actions against the defendant wherein the plaintiff's demand may exceed the sum of five pounds." And lastly, by the 19 *Geo.* 3, c. 70, s. 6, which takes away the arrest under ten pounds in inferior courts, it is provided, that "no cause, where the cause of action shall not amount to the sum of ten pounds or upwards" (since extended by the 51 *Geo.* 3, c. 124, s. 3, to fifteen pounds, and by the 7 & 8 *Geo.* 4, c. 71, s. 6, to twenty pounds) "shall be

(a) 1 *Prac.* 406, ed. 9.

1832.
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removed or removable into any superior court by *habeas corpus* or otherwise, unless the defendant shall enter into a recognizance to the plaintiff in the inferior court in two sufficient sureties in double the sum due for the payment of the debt and costs in case judgment shall pass against him." Here the cause of action was under twenty pounds, and it not appearing upon the face of the defendant's affidavits that the necessary recognizances have been entered into, the Sheriff is not shewn to have been guilty of any contempt in proceeding with the plaint. He was bound to proceed if the recognizances were not entered into. The case of *Lee et. Uxor v. Goodlad* (a), is in point. There, an action for defamation having been commenced in an inferior court, the defendant, after entering a common appearance and suffering judgment by default, removed the proceedings by *certiorari*, but without entering into any recognizance—the Court held, that the case was within the 51 Geo. 3, c. 124, s. 3, and awarded a *procedendo* for the defendant's default in not entering into the recognizance which that statute requires, the damage being laid at 13*l.* only. The Court there remarked upon the statute, "it extends to all actions brought for the recovery of debts or damages under 15*l.* It is peremptory in providing that no such cause shall be removed, unless the defendant shall enter into a recognizance to the plaintiff in the inferior court with two sufficient sureties in double the sum due for payment of debt and costs, in case judgment shall pass against him; and as the present defendant has not complied with that provision, the *certiorari* issued irregularly, and the *procedendo* ought to go."

Channel, contra, submitted that it was incumbent on the Sheriff to shew that no recognizances had been entered into, for the purpose of proving that he was regular in proceeding after a *pone* had issued.

(a) 4 D. & R. 350.

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 EMERSON.

TAUNTON, J.—I am very clearly of opinion that the rule, as to the attachment, must be discharged. In order to obtain an attachment, it must be clearly shewn that the Sheriff has been guilty of a contempt; but you cannot say he has been guilty of a contempt, when the defendant has not entered into the recognizances required by the 19 Geo. 3, c. 70, s. 6. In the absence of any proof that the defendant has entered into such recognizances, it must be presumed that he has not. As to the Sheriff's return, the Sheriff has probably stated a very bad cause for not proceeding with the plaint, but that does not prohibit him from shewing cause against a rule for an attachment.

For the attachment—Rule discharged.

For quashing the Sheriff's return—Rule absolute (a).

(a) And see *Talbot v. Binns*, 1 Moore & Scott, 148.

April 18th.

THOMSON v. SMITH.

Under Rule 2, of T. T. 1 W. 4, the actual and not the constructive residence of the bail must be stated.

COMYN opposed bail, on the ground of the notice of bail being defective, under Rule 2, *Reg. Gen. T. T. 1 Will. 4* (a). The notice described the bail as of "*Russia Cottage, Streatham*." On examination, however, he stated, that during the last three months he had not resided at *Streatham*, although he rented the cottage, but during that period he had resided at a lodging in the *Strand*. The rule requiring the residence of the bail for the last six months to be given in the notice, it is not satisfied by this description.

TAUNTON, J.—This rule does not require the statement of the mere constructive residence of the bail, but their actual residence. If it did not, it would open a door to fraud, and would be liable to constant evasion.

Bail rejected.

(a) See *ante*, p. 103.

1832.

JAMES v. DAWSON.

April 26th.

WALLINGER shewed cause against a rule for taxing the defendant his costs, pursuant to the 43 Geo. 3, c. 46, s. 3, on the ground that the plaintiff had not recovered the amount sworn to in the affidavit of debt, and for which the defendant had been arrested. The action had been commenced in the *Palace Court*, and removed into this Court. The words of the statute are, that "in all actions to be brought in *England* or *Ireland*, wherein the defendant or defendants shall be arrested and held to special bail, and wherein the plaintiff or plaintiffs shall not recover the amount of the sum for which the defendant or defendants in such actions shall have been so arrested and held to special bail, such defendant or defendants shall be entitled to costs of suit, to be taxed according to the custom of the Court in which such action shall have been brought; provided, it shall be made appear to the satisfaction of the Court in which such action is brought, upon motion to be made in Court for that purpose, and upon hearing the parties by affidavit, that the plaintiff or plaintiffs in such action had not any reasonable or probable cause for causing the defendant or defendants to be arrested and held to special bail in such amount." The Court here is not "the Court in which such action has been brought," and, therefore, it has no power to grant the defendant his costs. In the case of *Costello v. Cawley* (a), the action had been commenced in the *Palace Court*, and was removed by the defendant into the Court of *Common Pleas*. The plaintiff having recovered considerably less than the sum for which he had arrested the defendant, and holden him to special bail, a rule *nisi* was granted to tax the latter his costs, under the 43 Geo. 3,

If a defendant be arrested on process from the *Palace Court*, and the cause is removed into the Court of *K. B.*, and the plaintiff does not recover to the amount sworn to in the affidavit of debt, the defendant is not entitled to his costs under the 43 Geo. 3, c. 46, s. 3.

(a) 1 M. & P. 315; S. C. 4 Bing. 474.

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c. 46, s. 3. The Court there thought that they had no authority to interfere. In *Handley v. Levy* (a), the Court of *King's Bench* was of the same opinion.

Archbold, contra.—This is an action within the equity of the statute. When a cause is removed by *habeas corpus* into this Court from an inferior jurisdiction, a party is obliged in fact to begin a new action: there is a new declaration, and new proceedings altogether. The plaintiff may declare for another cause of action, if he thinks proper. He must declare here. The cause is, therefore, begun here, as this declaration is, in fact, under such circumstances, the commencement of the action. The action is, in fact, brought here.

TAUNTON, J.—The Courts of *King's Bench* and *Common Pleas* having intimated an opinion on this statute, that the word “brought” is the same as “originally commenced,” I am bound by their decision. If the case was to be considered now for the first time, I will not say what my opinion might be. The rule must, therefore, be discharged.

Rule discharged.

(a) 8 B. & C. 637.

April 26th.

CROSS v. LANG.

A notice of trial at “*Guildhall, Westminster*,” the Court of *King's Bench* not sitting there, is defective, if the defendant swears that he was misled by it.

ARCHBOLD shewed cause against a rule for setting aside the verdict and judgment in this case, with costs, on the ground of irregularity. The irregularity complained of was in the notice of trial. The notice of trial was in these terms:—“In the *King's Bench*, *Hilary Term*, 2 *William 4*, *John Cross v. James Lang*, a prisoner. Mr. *James Lang*,

take notice of trial in this cause, which will be tried as an undefended cause, at the Sittings for the County of *Mid-dlesex*, at the *Guildhall, Westminster*," The notice of trial for "*Guildhall, Westminster*," is said to be irregular, because no sittings are going on at the *Guildhall*. But, it being notorious to every one, that the Court of *King's Bench* does not sit at *Guildhall*, the defendant could not have been misled. Besides, he has not sworn, that he had delivered a brief, employed an attorney, or taken out a *habeas corpus*, to bring himself up from custody, to defend his cause.

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v.
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Platt, contra, referred to the affidavit of the defendant's son, who stated, that he had come on the day mentioned in the notice of trial, to *Guildhall, Westminster*, had found no Court sitting, and had been informed there, that no sittings would take place until several days after. This information, the defendant himself swore, had caused him to abstain from making any further attempt to defend the cause. The Court of *King's Bench* did, for a considerable time, sit at *Guildhall, Westminster*, and, therefore, a professional man, much more an unprofessional man, might be misled.

TAUNTON, J.—I yield to this objection with very great reluctance. It is important to preserve forms. This defect is not a mere silence as to the place of trial, it is a misdescription of it; and the defendant swears he was misled by it. The rule must, therefore, be made absolute.

Rule absolute.

1832.

GREEN v. ELGIE.

April 26th.

(Before the Four Judges.)

The omission of a return day in the *præcipe* for a bill of *Middlesex*, is not an irregularity.

If a *fi. fa.* on a judgment have been executed, but not returned, and the defendant is arrested in an action on the judgment, the Court will not set aside the arrest.

If an *ac etiam* is in *assumpsit*, and the affidavit to hold to bail is in debt, the Court will discharge the defendant on putting in bail to the amount of 40*l.*

CAMPBELL shewed cause against a rule calling on the plaintiff to shew cause why all proceedings should not be set aside for irregularity, with costs, to be taxed by the Master; or why the bail-bond given to the Sheriff should not be delivered up to be cancelled, on filing common bail; and that in the mean time proceedings be stayed. The facts were the following:

In *Michaelmas* Term, 1829, the plaintiff recovered a judgment against the defendant for 3,372*l.*, and in *May*, 1832, the plaintiff issued a *fi. fa.* directed to the Sheriff of the county of *Worcester*, against the goods of the defendant. The Sheriff entered into possession, and, having remained there some time, was informed that the furniture belonged to another person; he then retired. In *December*, 1830, the plaintiff sued out another *fi. fa.* directed to the Sheriff of *Middlesex*, and under it the defendant's goods were seized to the amount of 68*l.* and upwards. Neither of these writs of *fi. fa.* were returned. On the 20th *March*, 1832, the defendant was arrested on a bill of *Middlesex*, for a sum of 1800*l.* and upwards, sworn to be due on the judgment recovered. The *ac etiam* stated the money to be due "on promises." In the *præcipe* for the bill of *Middlesex*, no return day was mentioned. The objections on the other side to the plaintiff's proceedings were threefold. *First*, it was said that the *præcipe* not mentioning any return day, was irregular. That was no objection, because the statement of the return was only instruction to the officer as to the day when the writ was to be returned. *Secondly*, it was contended, that the writs of execution not having been returned after a levy had been made, before the bill of *Middlesex* issued, that writ was irregular. But, if enough to satisfy the

judgment had been levied, that might be pleaded as an answer to the action. *Thirdly*, it was objected that the affidavit disclosed a cause of action, which, if it existed, must be in *debt*, but the process was in *assumpsit*. This objection was premature. The plaintiff had not declared, therefore no variance could as yet appear.

1832.

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White, in support of the rule.—With respect to the want of a return to the *præcipe* for the bill of *Middlesex*, it is necessary there should be a *præcipe*, and this being an imperfect one, it is the same as if there were no *præcipe* at all. He cited *Wadworth v. Allen* (a).

LORD TENTERDEN, C. J.—No doubt there must be a *præcipe*, but the introduction of the return is a mere direction to the officer. If the plaintiff wishes the writ to be returned on a particular day, he states it to the officer; but if not, the officer makes it returnable according to the course of the office. There is nothing in that objection.

White.—With respect to the second objection, I find no case in which it has been expressly decided, that an arrest on a judgment after a *fi. fa.* has issued, but not returned, is irregular. But there are various cases, in which the Court have holden, that a *ca. sa.* cannot be issued after a *fi. fa.* has been issued, until the latter writ has been returned. In *Lawes v. Codrington* (b), the marginal note is this: "Where a *fi. fa.* has issued, and a levy less than the plaintiff's debt has been made, a *ca. sa.* cannot issue till after the return day of the *fi. fa.*, although in fact the Sheriff has made a return to it, and the *ca. sa.* recites the writ and the Sheriff's return." The judgment of Mr. Justice *Parke* in that case is this: "If you execute the *fi. fa.* you cannot take another step till the following term, for that

(a) 1 Chit. Rep. 186.

(b) *Ante*, p. 30.

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writ cannot be returned into Court until the Court in contemplation of law is sitting."

PARKE, J.—There the defendant could not have pleaded the fact of the levy. But here, you may plead it as a good defence to the action, if the whole debt has been levied; or a defence so far as the sum levied extends. We, therefore, in such a case, are not in the habit of interfering summarily.

White.—But, on principle, there is no distinction. In *Lawes v. Codrington*, if the *ca. sa.* had issued for a greater sum than the residue of the debt, after deducting the sum levied, the defendant might have had an *audita querela*. The Court, in several cases, is in the habit of granting relief on summary application, where the ground of the application may be pleaded. As, for instance, in the case of a *feme coverte* being arrested. In further support of the second point, he cited *Wilson v. Kingston* (a), and *Miller v. Parnell* and Another (b). Then, with respect to the third point, that a variance existed between the affidavit of debt and process, Mr. Tidd laid it down, "That the affidavit to hold to bail must correspond in substance with the process." For this statement he cited 1 *Chit. Rep.* 659, n. (a). Here the affidavit is in *assumpsit*, and the cause of action is in *debt*. This variance cannot be cured by the declaration. The defendant would be in no better situation by waiting until the plaintiff had declared. The present application, therefore, is not premature.

Follett followed on the same side.

LORD TENTERDEN, C. J.—I think there is nothing in

(a) 2 *Chit. Rep.* 203.

(b) 2 *Marsh.* 78; *S. C.* 6 *Taunt.* 370.

the objection that this action should not have been commenced until after the return of the *fi. fa.* It would have been necessary, that the *fi. fa.* should have been returned before a *ca. sa.* could have issued; but, the not returning it is no ground for setting aside the proceedings as irregular. The defendant may plead the fact of a certain sum having been levied, and may, according to its amount, give a complete or partial answer to the action. As to the objection, that the *ac etiam* does not correspond with the affidavit to hold to bail, I think he is entitled to be discharged on putting in bail to the amount of 40*l.*, as there was in fact no *ac etiam*.

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LITTLEDALE, J., concurred.

PARKE, J., concurred, and observed that, by the new Rules of *Hilary* Term (*a*), the want of an *ac etiam*, "where the defendant is arrested, shall not be deemed ground for discharging the defendant or the bail; but the bail bond or recognizance of bail shall be taken with a penalty or sum of 40*l.* only." The defendant must, therefore, be discharged on putting in bail to the amount of 40*l.* only.

PATTESON, J., concurred.

Rule absolute for discharging the defendant out of custody, on putting in bail to the amount of 40*l.*

(*a*) See 1 Reg. Gen. H. T. 2 Will. 4, s. 10, *ante*, p. 184.

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April 27th.

SUTTON v. OSWALD.

The Court will not make an order to hold a tenant to bail under 11 *Geo. 2*, c. 19, s. 3, for double the amount of goods clandestinely and fraudulently removed from premises on which arrears of rent have accrued.

CRESSWELL moved for a rule to shew cause why an order should not be made for holding a person, named *Oswald*, to bail, on the 11 *Geo. 2*, c. 19, s. 3, in double the amount of certain goods and chattels fraudulently and clandestinely removed by him, from premises on which arrears of rent had accrued. He made this application on the part of the landlord. He was not aware of any instance in which the Court had interfered to make such an order; but, from the instances to be found in the books of practice, he conceived it might be made. *Mr. Tidd* (a) says, "in an action of debt on a penal statute, the defendant cannot be arrested, though it be for a sum certain, as it is a maxim, that every man shall be presumed innocent of an offence till he be found guilty. But where an action is brought on a remedial statute, as for money won at play, or on a statute which expressly authorizes an arrest, as for exporting wool, double value for holding over, having unsealed wrought silks, or insuring lottery tickets, &c., the defendant may be arrested." Now, it has frequently been held, that the statute of 11 *Geo. 2* is a remedial act. On principle, therefore, the Court have power to make such an order.

TAUNTON, J.—Why did not the landlord pursue the goods, and seize them, as he has a right to do, within thirty days after the removal. He should have made use of that remedy before he has recourse to the action for the penalty. The former remedy is given in a previous part (s. 1) of the statute; the action for the recovery of the penalty is given in a latter part of it (s. 3).

Cresswell.—The goods have been sold as well as removed, and therefore he could not seize the goods.

(a) 1 *Prac.* 172.

TAUNTON, J.—If the law allows you to arrest the defendant, arrest him : if it does not, I have not the power.

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Cresswell.—There are many cases in which the law allows an arrest, but not without the authority of an order of a Judge ; and this, I submit, is one of those cases.

TAUNTON, J.—This statute has been passed near a hundred years, and yet no precedent can be found of a Judge's order having been made to hold a tenant to bail under such circumstances. That is strong evidence to shew, that no such order ought to be made.

Rule refused.

JACOB v. RULE.

April 28th.

HUTCHINSON shewed cause against a rule for restoring a cause to Lord *Tenterden's* paper, out of which it had been struck. He submitted, that the Court had no power to interfere with the proceedings of the Judge at *Nisi Prius*, in such a matter.

The Court in *banc* has no jurisdiction over the cause list at *Nisi Prius*.

Comyn, contra.—The object of the present application is to enlarge a rule for judgment as in case of a nonsuit.

TAUNTON, J.—I do not know that the Court has any jurisdiction over the list of causes at *Nisi Prius*. It is exclusively in the power of the Judge who tries the causes. I have repeatedly refused such an application at Chambers. I cannot interfere.

Rule discharged.

1832.

April 28th.

A judgment and execution on a *cognovit*, not filed according to the provisions of the 3 Geo. 4, c. 39, are not absolutely void, but only inoperative against the assignees of a bankrupt.

A *cognovit* does not require a stamp, though containing a stipulation not to take advantage of its being given before declaration.

GREEN v. GRAY.

BUTT shewed cause against a rule obtained by *Chancellor*, for setting aside the judgment signed, and the execution issued in this case, and the payment, by the plaintiff, of the costs of this application. In the present case, the assignees of a bankrupt, named *Gray*, applied to set aside the judgment and subsequent proceedings on a *cognovit* given by the bankrupt, which *cognovit* was not filed according to the directions of the 3 Geo. 4, c. 39, s. 3. The question, in the present case, is whether the *cognovit*, under these circumstances, is absolutely void, or only inoperative as against the assignees. The third section is in these terms:—"That every *cognovit actionem* given by any defendant in any personal action, in case the action in which such *cognovit actionem* shall be given shall be in the said Court of *King's Bench*, or a true copy of such *cognovit actionem*, in case the action wherein the same is given shall be in any other Court, shall, together with an affidavit of the time of the execution thereof, be filed with the said clerk, in like manner as such warrants of attorney, or copies thereof and affidavits, within the space of twenty-one days after such *cognovit actionem* shall have been executed; such *cognovit actionem*, and any judgment entered up thereon, and any execution taken out on such judgment, shall be deemed fraudulent and void against the assignees of the person giving such *cognovit actionem*, under a commission of bankrupt issued against him, after the expiration of the said space of twenty-one days, in like manner as warrants of attorney and judgment, and execution thereon, are deemed and taken to be fraudulent and void by this act." The previous section (2) makes certain provisions as to warrants of attorney, in these terms: "If at any time after the expiration of twenty-one days next after the execution of such warrant of attorney, a commission of bankrupt shall be issued against the person who shall have

given such warrant of attorney, under which he shall be duly found and declared a bankrupt, then, and in such case, unless such warrant of attorney or a copy thereof shall have been filed as aforesaid, within the said space of twenty-one days from the execution thereof, or unless judgment shall have been signed, or execution issued on such warrant of attorney within the same period, such warrant of attorney, and the judgment and execution thereon, shall be deemed fraudulent and void against the assignees under such commission; and such assignees shall be entitled to recover back and receive for the use of the creditors of such bankrupt at large, all and every the monies levied, or effects seized under and by virtue of such judgment and execution." The third section thus referring to the second, and making *cognovits* void in like manner as warrants of attorney under the second section—unless a warrant of attorney would be absolutely void, a *cognovit* will not be absolutely void. There is no decision directly on this section; but I submit, that, on the language of the two clauses, the *cognovit* is only inoperative as against the assignees; and any money levied under the execution they might recover back. The cases of *Morris v. Mellin* (a), and *Bennett v. Daniel* (b), were on the fourth section, which provides, "That if such warrant of attorney or *cognovit* shall be given subject to any defeazance or condition, such defeazance or condition shall be written on the same paper or parchment on which such warrant of attorney or *cognovit actionem* shall be written before the time when the same, or a copy thereof, respectively, shall be filed, otherwise such warrant of attorney, or *cognovit actionem*, shall be null and void to all intents and purposes." The Court, in those two cases, was of opinion that the warrant, though not written on the same paper or parchment, was void only as against the assignees of a bankrupt, and not void as against other persons. One of the Judges,

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(a) 6 B. & C. 446.

(b) 10 B. & C. 500.

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in each of those cases, thought differently, but the three others were of that opinion. But, in sect. 4, the words "null and void to all intents and purposes" occur, but they do not occur in sect. 3. The language of the latter section must be considered, therefore, as less extensive than that of sect. 4. Lord *Tenterden*, in the case of *Morris v. Mellin*, observed—"If we were to give to the fourth section the effect we are called upon to do, it would apply to all warrants of attorney, and it would have the effect of protecting creditors, although no commission of bankrupt had issued against the debtor who gave the warrant of attorney, and it would render it void in favour of the party himself." And, again—"We should even enable a party who gave the warrant of attorney to treat it as a nullity, on that ground." It is clear, from this language of Lord *Tenterden*, that the *cognovit* must be taken as inoperative only against the assignees, and not as void against all the world. Suppose the bankrupt's estate to pay twenty shillings in the pound, and the commission, consequently, to be superseded (a), the plaintiff would clearly be entitled to the benefit of the judgment entered up on the *cognovit*. But if it were to be considered as void against all the world, he would be deprived of that benefit. Again, a judgment binds lands from the time at which it is signed. Now, suppose a party had given such a *cognovit* as the present, and on which judgment is signed, the judgment creditor thus acquires a lien on the land; the judgment debtor then becomes bankrupt, under circumstances which would give his assignees no right against the lien; but if the assignees could, under the statute now relied on, set aside the judgment on the ground urged in this case, they would thus destroy the judgment creditor's lien, and do that indirectly, which they could not do directly. Or, suppose the commission to be superseded, on the ground of its having improperly issued, the plaintiff would still be

(a) See Archbold's Bankruptcy, 217, ed. 3.

entitled to the benefit of his judgment on the *cognovit*; but if it were to be declared null and void, on account of the commission issuing, he would not be able to avail himself of the judgment. It may, perhaps, be contended, that although not absolutely void against all the world, it is absolutely void against the assignees. But that mode of treating it is, in fact, the same as treating it as void against all the world. A second objection in the present case is, that the *cognovit* is not stamped. The cases of *Eames v. Hill*(a), *Reardon v. Swabey* (b), and *Jay v. Warren* (c), shew that a stamp is not necessary on a *cognovit*.

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Channel, contra, admitted that the *cognovit* was not void as against all the world, but submitted that it was absolutely void as against the assignees. The observations of Mr. Justice *Holroyd*, in *Hurst v. Jennings* (d), seemed to go to that extent. In that case it was held, that an indenture, by virtue of which the judgment there was entered up, was a *cognovit actionem* within the meaning of the third section of the 3 Geo. 4, c. 39, or, if not, that it was a contrivance to defeat the provisions of that statute; and the indenture not having been filed with the proper officer within twenty-one days after its execution, and judgment not having been entered up within that period, as required by the statute, the Court, upon application by the assignees of the obligor, who had become bankrupt, ordered the execution to be withdrawn. There Lord *Tenterden* said—"If we see that the execution has issued on a judgment, which has been obtained by means of a contrivance devised to evade the provisions of an act of Parliament, or any rule of the common law, we ought not to allow the execution to continue in force, so as to have that effect. I am clearly of opinion, that the bond and indenture by which the plaintiffs were

(a) 2 B. & P. 150.

(b) 4 East, 188.

(c) 1 C. & P. 532.

(d) 5 B. & C. 650.

(e) See 1 Tid. Prac. 560, ed. 9.

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authorized to enter up judgment, and sue out execution, were devised with the intention to evade the provisions of the 3 Geo. 4, c. 39." Mr. Justice *Holroyd* said—"I think that this execution ought to be set aside. This is a case either within the act of Parliament, or the deed and judgment were a contrivance to defeat the provisions of it. By the first section, every warrant of attorney must be filed within twenty-one days after execution, in the manner therein mentioned. By section 2, if it has not been filed within that time, it is to be deemed fraudulent and void against the assignees under any commission of bankrupt afterwards issued against the party giving the warrant." It is clear, therefore, that if the instrument executed in this case had been a warrant of attorney, instead of a bond and indenture, the judgment and execution would have been void against the assignees, because the provisions of the statute had not been complied with. From this it should seem that he was of opinion, that if the provisions of the statute were not complied with, a warrant of attorney would be void. The third section placing *cognovits* on the same footing as warrants of attorney, he would be of opinion, in the present case, that the *cognovit* was void. As to the second point, namely, the stamping, it was true that the *cognovit* did not require a stamp, unless it contained terms of agreement; but there are stipulations contained in this.

TAUNTON, J.—There are no stipulations contained in it which may not be found in every *cognovit*. If they constituted an agreement, then every *cognovit* would require a stamp; but the Courts have said that a *cognovit* does not require a stamp.

Channel.—The defendant agrees, in addition to the general stipulation, that no writ of error shall be brought, or bill in equity filed, that he will take no advantage of the

fact of the *cognovit* being given before declaration. It is contrary to the practice of the Court to give a *cognovit* until after declaration, since, the *cognovit* being a confession of the action, and the nature of the action not being known until the plaintiff has declared, he cannot confess it until then (a).

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TAUNTON, J.—This rule calls upon the plaintiff to shew cause why the judgment signed and execution issued thereon should not be set aside, and why the plaintiff should not pay the costs of this application. The rule is moved for on sect. 3 of the 3 Geo. 4, c. 39. The words of that section are—"Every *cognovit actionem* given by any defendant in any personal action, in case the action in which such *cognovit actionem* shall be given shall be in the said Court of *King's Bench*, or a true copy of such *cognovit actionem*, in case the action wherein the same is given shall be in any other Court, shall, together with an affidavit of the time of the execution thereof, be filed with the said clerk, in like manner as such warrants of attorney, or copies thereof, and affidavits, within the space of twenty-

(a) 1 Tid. Prac. 559, ed. 9. By the 1 Will. 4, c. 7, s. 7, the 108th section of the 6 Geo. 4, c. 16, is modified. The proviso of s. 108 of 6 Geo. 4, c. 16 is, "Provided that no creditor, though for a valuable consideration, who shall sue out any execution upon any judgment obtained by default, confession, or *nihil dicit*, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateable with such creditors." The seventh section of the 1 Will. 4, c. 7, provides, "That no judgment signed, or execution issued after the passing of this act,

on a *cognovit actionem* signed after declaration filed or delivered, or judgment by default, confession, or *nihil dicit*, according to the practice of the Court, in any action commenced adversely, and not by collusion, for the purpose of fraudulent preference, shall be deemed or taken to be within the said provision of the said recited act." In the above *cognovit*, the defendant could not have agreed to waive the objection arising on this latter act, as any objection on it might be made by the assignees. See 2 Dowling's Statutes, 18, note (f).

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one days after such *cognovit actionem* shall have been executed, otherwise such *cognovit actionem*, and any judgment entered up thereon, and any execution taken out on such judgment, shall be deemed fraudulent and void against the assignees of the person giving such *cognovit actionem*, under a commission of bankrupt issued against him after the expiration of the said space of twenty-one days, in like manner as warrants of attorney, and judgments and executions thereon, are deemed and taken to be fraudulent and void by this act." That is, therefore, putting judgments and executions on *cognovits* on the same footing as judgments and executions on warrants of attorney are put by the second section, and the same consequences are to follow. That renders it necessary to see the provisions of the former section as to judgments and executions on warrants of attorney. Section 2 is in these words:—"Such warrant of attorney, and the judgment and execution thereon, shall be deemed fraudulent and void against the assignees under such commission; and such assignees shall be entitled to recover back and receive, for the use of the creditors of such bankrupt at large, all and every the monies levied or effects seized under and by virtue of such judgment and execution." Now, this application has been made on behalf of the assignees of *Gray*, the defendant; and it is said, that, as the statute has declared the judgment and execution in such cases fraudulent and void against a commission of bankrupt, they are fraudulent and void against all the world, and, therefore, that the rule ought to be made absolute for setting aside the judgment and execution. But I think that this rule ought not to be made absolute. I am of opinion, that the statute expressly limits the consequences of not filing the *cognovits* within a given time, to the enabling the assignees of the bankrupt to recover back and receive for the benefit of the creditors the proceeds of the judgment and execution thereon. It does not follow, that, because the judgment

and execution are to be void for that particular purpose, they are to be void for all purposes. Supposing this bankrupt's estate to pay twenty shillings in the pound, when the commission would be superseded *de jure*, the plaintiff would be entitled to the benefit of this judgment; for, when the commission is at an end, it is as if no commission had issued. It is too much to say, that the judgment and execution are void for all purposes, because it is void for one purpose. Then, as to the point of a stamp being necessary on the *cognovit*. It is not an agreement, for an agreement imports something to be done on both sides; but there does not appear to be any mutuality in this *cognovit*, and, therefore, it is not one of those cases in which the instrument ought to be stamped. The present rule must therefore be discharged.

Rule discharged.

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v.
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FORD v. BAYNTON.

April 28th.

STEER shewed cause on the part of the judgment creditor, against a rule obtained by *W. Clarkson*, on the part of the Sheriff of the county of *Kent*, under the 1 & 2 *Will.* 4, c. 58, s. 6(a), calling on the parties claiming certain property seized by the Sheriff under a *fi. fa.* The facts of the case were these:—A gentleman named *Baynton* had sent two horses and two servants to the house of an inn-keeper named *Birch*, in the county of *Kent*. There he had left them. After a considerable sum had become due for the keep of the horses and the board and lodging of the servants, both the servants went away, taking with them one horse. Afterwards, a *fi. fa.* issued against Mr. *Baynton's* goods; and the Sheriff seized the remaining horse at the stables of Mr. *Birch*. The latter

The Court will relieve the Sheriff under the 1 & 2 *Will.* 4, c. 58, s. 6, in the case of conflicting claims on property seized by him, though that claim is only of a lien, and not of the whole property.

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refused to permit the horse to be removed, claiming a lien on it for his claim on Mr. *Baynton* for the keep of the two horses, and the board and lodging of the servants. The Sheriff therefore found it necessary to apply for relief under the Interpleader Act.

V. Richards appeared on the part of *Birch*.

W. Clarkson appeared for the plaintiff.

TAUNTON, J.—I feel some doubt, whether this case is within the act. The sum in dispute is very small, and therefore it is hardly worth directing an issue to try the rights of the parties. It would, perhaps, be better that the Court should decide upon the question of lien, if it should be of opinion that the present case comes within the meaning of the statute.

This suggestion of the Court was accepted by all parties.

Cur. adv. vult.

April 30th.

TAUNTON, J.—I have conferred with the other Judges; and we are of opinion, that, although the act, from its language, should seem to have in view only those cases in which the entirety of the property is claimed, yet the letter of the act will comprehend cases of claims of lien as well as of absolute property. This section (6) which has for its object to quiet claims where the Sheriff is concerned, extends to the present case. It is also to be observed, that, in the commercial world, a lien may be equal to the entire value of the goods. We are further of opinion, that there is no pretence for saying that there was any legal claim of lien on this remaining horse, in respect of the board and lodging of the servants; that is perfectly clear. But we are of opinion, that as the two horses were brought at one and the same time, and there-

fore under one contract relating to both, the lien of the inn-keeper upon both survives as to the remaining one. The inn-keeper must therefore be paid the amount due for the keep of both horses. The rule, therefore, will be enlarged until that is done; and when it is done, the rule will be discharged without any costs at all. The case of *Blake v. Nicholson* (a), as to lien, is very like the present. There it was holden, that a "printer employed to print certain numbers, but not all consecutive numbers, of an entire work, has a lien upon the copies not delivered for his general balance due for printing the whole of those numbers."

Rule enlarged.

(a) 3 M. & S. 167.

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In Sutton v. Faulkner, 3. Exch. 407.

DOE d. BLAGG v. STEEL.

April 30th.

C. CRESSWELL moved to review the Master's report in an action of ejectment, under these circumstances—The lessor of the plaintiff was a mortgagee; the defendant had moved to stay proceedings under the 7 Geo. 2, c. 20, ss. 1, 2, upon payment of principal, interest, and costs; and it was referred to the Master to ascertain what was due. The defendant *Steel* had agreed with Mr. *Colqhuit*, the owner in fee, for the purchase of the premises in question. He had paid part of the money before he discovered that there was an outstanding mortgage in *Blagg*, the lessor of the plaintiff. A Miss *Vaughan* had lent a sum of money to *Colqhuit*, and some time afterwards he mortgaged to her the premises in question as a security. She assigned the mortgage to *Blagg*. The Master, in ascertaining what was due, had taken into the account three sums, amounting to 50*l.*, which the defendant contended he was not liable to pay. He referred to the words of the act—"That when any action of ejectment shall be brought by any mortgagee for the recovery of the possession of any mort-

In an ejectment on a forfeiture in not paying mortgage money, the defendant is entitled to have proceedings staid under the 7 Geo. 2, c. 20, upon payment of the principal and interest due on the mortgage deed, with the costs incurred at law and in equity, without paying any by-gone interest, or the expense of preparing the mortgage deed, or any assignment of it.

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gaged lands, &c., and no suit shall be then depending in any of his Majesty's Courts of equity in *England*, for foreclosing or redeeming such mortgaged lands; if the person having right to redeem such mortgaged lands, and who shall appear and become defendant in such action, shall, at any time pending such action, pay unto such mortgagee, or, in case of his refusal, shall bring into Court where such action shall be depending, all the *principal monies and interest due on such mortgage*, and also *all such costs as have been expended in any suit or suits at law, or in equity, upon such mortgage*, (such money for principal, interest, and costs to be ascertained by the Court where such action is depending, or by the proper officer by such Court to be appointed for that purpose), the monies so paid to such mortgagee, or brought into such Court, shall be deemed and taken to be in full satisfaction and discharge of such mortgage, and the Court shall discharge such mortgagor from the same accordingly, and shall, by rule of the same Court, compel such mortgagee, at the costs of such mortgagor, to re-convey such mortgaged lands, and such estate and interest as such mortgagee hath therein, and deliver up all deeds, evidences, and writings in his custody, relating to the title of such mortgaged lands, unto such mortgagor, who shall have paid such monies into the Court, or to such other person as he shall for that purpose appoint." The sums objected to were, first, a sum of 10*l.*, which was admitted to have been due to Miss *Vaughan* for interest, before the mortgage was created. The second was a sum of 22*l.* for preparing the mortgage; and the third was a sum of 18*l.*, for the expense of the assignment. He contended that none of those sums ought to have been allowed, and that they were not contemplated by the act of Parliament, and that the Master was not correct in deciding that they came within the equity of the statute.

V. Richards shewed cause in the first instance, and contended that those sums ought to be included. He said,

that upon a bill to foreclose he would clearly have been entitled to them. With respect to the 10*l.*, it was paid by Mr. *Blagg* to Miss *Vaughan*, and the Master found it to be due, and he submitted that the Master's decision was final. Another objection was, that this was not a case within the act. There was here an absolute conveyance in trust to sell; and he cited a decision of the Vice-Chancellor, not yet reported, that though in ordinary cases a party may tack, yet that upon such a deed as this the party could not be allowed to tack; and that that Court had evidently considered it not to be a mortgage.

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C. Cresswell in reply, contended that it was clearly a mortgage within the meaning of the act, as it was made to secure principal and interest. In modern mortgages it was usual to introduce a power of sale, with or without the consent of the mortgagor. Where the object of the conveyance appears to be to secure a sum of money, the security is to be considered a mortgage. Though the sums in dispute are sworn to have been paid by Mr. *Blagg* to Miss *Vaughan*, yet he clearly could not have recovered the costs of the assignment as against the mortgagor; otherwise he would be liable to pay for any number of subsequent assignments, even to the extent of exhausting the whole value of the estate.

TAUNTON, J.—The rule must be made absolute. The deed is to be considered, to all intents and purposes, a mortgage within the meaning of the 7 *Geo. 2*. Though there is an absolute power to sell, the estate would be clearly redeemable by paying the money due at any time before the mortgagee had actually executed his power of sale. The objections to the Master's report are well founded. The 10*l.* was for by-gone interest, and it was not included in the mortgage nor made part of the principal: it was, therefore, merely a collateral debt. The ex-

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penses allowed are neither expenses at law nor in equity. If the mortgagor could be saddled with the expense of this assignment, he might be liable for an indefinite series of assignments.

Rule absolute, with costs.

April 30th.

PIERCY and Another v. OWEN.

A separate motion is not necessary for the costs of the day for not proceeding to trial where the rule for judgment as in case of a nonsuit is discharged.

ON discharging a rule for judgment as in case of a nonsuit for not proceeding to trial—

TAUNTON, J., said, he would grant the costs of the day for not proceeding to trial as a separate part of the order, but not as a condition of discharging the rule. It was not therefore necessary to make a separate motion for the costs, under the 69th rule of the first division of the rules of *Hilary Term, 2 Will. 4.*

Justice shewed cause, and—

V. Richards supported the rule.

Rule discharged, and the plaintiff ordered to pay the costs of the day, for not proceeding to trial.

April 30th.

Re SANDYS.

A rule cannot be served at the last place of an attorney's abode, unless it appears

BUSBY obtained a rule to shew cause why an attorney of this Court should not pay over a certain sum of money to be that stated in the residence-book, or that none is there stated.

to a lady named *White* within a certain period. As to the mode of serving the rule some difficulty existed. His residence was unknown. The Court would perhaps allow the service to be by leaving it at his last place of abode, and by sticking it up in the *King's Bench* Office. He admitted that no search had been made in the residence-book for the abode of the attorney.

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Re SANDYS.

TAUNTON, J.—The mode of service desired cannot be allowed, unless it is shewn that the residence-book has been searched. The service should be effected at the residence there stated.

Busby then undertook that the residence-book should be searched, and that service should be effected at the residence of the attorney there stated. If none were there stated, then the service should be effected as prayed.

Rule granted.

DIGBY v. THOMSON.

April 30th.

FOLLETT shewed cause against a rule calling on the defendant to shew cause why service at 334, *Strand*, or 119, *Fleet Street*, should not be good service on the defendant. The action was for a libel, which had appeared in the *Satirist* newspaper, of which the defendant was the editor, and a proprietor; and the two addresses were entered at the Stamp Office as those of one of the proprietors, pursuant to the provisions of the 38 *Geo.* 3, c. 78, s. 2. The affidavit on which the rule had been obtained stated that various attempts had been made to serve the defendant, but without effect. That, however, did not dispense with the necessity of service of process personally, which was required by the 5 *Geo.* 2, c. 27, s. 1, refer-

The service of process must be personal, and no difficulty in effecting personal service will dispense with it.

Service of process on a newspaper proprietor at the place of abode given at the Stamp Office according to the 38 *Geo.* 3, c. 78, s. 2, is not sufficient without personal service.

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ring to the 12 *Geo.* 1, c. 29, s. 1. Mr. *Tidd*(a) pointed out some of the cases in which an actual personal service was not necessary. For instance, "if the defendant refuse to accept a copy of process, it may be left in his house, or, if he lock himself in, it may be put through the crevice of his door; or, in the *Common Pleas*, it seems that if he keep out of the way to avoid being served, it may be sent to him in a letter, by the post: but sending process by the post in a letter, which defendant refuses to receive, is not good service, although the refusal may have been wilful, and accompanied with a long avoidance of service." In those cases, where the Court had dispensed with the necessity of personal service, it was clear the process had come to the knowledge of the defendant, although not actually put into his hands.

Wightman, contra, submitted that it was only necessary that sufficient should be shewn to induce the Court to believe the process had come to the hands of the defendant. There was good reason in this case to believe it had; for the defendant appeared by his counsel in Court to shew cause against the rule, which had been served in the same manner as the process; and he did not venture to swear that he had not received the process. Besides, the place at which the process had been left was the residence given at the Stamp Office, according to the directions of the 38 *Geo.* 3, c. 78, s. 2. That statute would seem to have required the information as to residence to be given for the purpose of facilitating the service of process. If so, then this service would suffice.

TAUNTON, J.—I am afraid this rule must be discharged, for the statute requires the defendant to be served "personally." This has been considered necessary, though

(a) 1 *Prac.* 169.

the defendant has persevered in avoiding personal service. The cases mentioned by Mr. *Tidd* shew that the Courts have been of this opinion. The case of *Aldred v. Hicks* (a), allowing service by post, was corrected by *Redpath v. Williams* (b). There is no proof here that the defendant was in the house at the time of leaving the process. This service only stands on the fact that several attempts have been made to serve him, and he cannot be found. As to the statute of 38 *Geo. 3*, c. 78, s. 2, requiring the printers, publishers, and proprietors of newspapers to deliver at the Stamp Office an affidavit containing their places of abode, that statute does not go on to say that process may be served on any of them by leaving it there. The Court cannot engraft on that statute such an exception to the provisions of the 5 *Geo. 2*, c. 27. The rule must, therefore, be discharged, but without costs.

1832.
 DIGBY
 v.
 THOMSON.

Rule discharged, without costs (c).

- (a) 5 Taunt. 186. (c) See *Rhodes v. Innes*, ante,
 (b) 11 J. B. Moore, 333; S. C. p. 215; S. C. 7 Bing. 329; and
 3 Bing. 433. *Thomson v. Phenev*, post.

DOE v. ROE.

April 30th.

PLATT moved for judgment against the casual ejector. The tenant in possession was sworn to have acknowledged the receipt of the declaration "about the latter end of February."

What is a sufficient acknowledgment by a tenant in possession, of receiving a declaration in ejectment.

TAUNTON, J.—As that receipt was clearly before the first day of the present term, that is sufficient.

Rule granted.

1832.

April 30th.

The Court will compel a plaintiff, executrix, who is out of the jurisdiction, to give security for costs; but such security will be confined to those costs only for which she would be liable.

CHAMBERLAIN, Executor of THOMAS, v. CHAMBERLAIN.

TALFOURD shewed cause against a rule requiring the plaintiff to give security for costs, she being abroad. The plaintiff is an executrix, and therefore not liable to pay costs. She might be liable to costs in case of a discontinuance, but not so if a verdict passed against her. It would, therefore, be useless to require the plaintiff to give security for costs for which she would not be liable. The *Common Pleas* in one case of *Chevalier* and Others, Executors of *Fox*, v. *Finnis*(a), have decided, that plaintiffs who live out of the jurisdiction of the Court, may be compelled to give security for costs, though such plaintiffs sue as executors. Were it not for that case, the Court would not interfere.

TAUNTON, J.—I think, that, as the Court of *Common Pleas* has so decided, I must be governed by its decision; for, it appears to me to be good sense. The plaintiff, though an executrix, is not freed from her liability for costs in all cases. If she should discontinue, she would be liable for costs. The security will, of course, be confined to such costs as she would be liable to in point of law.

Rule absolute (b).

(a) 1 Brod. & Bing. 277.

p. 299; *Anon. ante*, p. 300; and(b) See *Adams v. Brown, ante*,
p. 273; *Wilson v. Minchin, ante*,*Jones v. Jones, ante*, p. 313.

April 30th.

WELLS v. HARE.

If a demand of declaration has been served, and time to declare is obtained, the defendant may sign judgment of *non pros.* without a fresh demand of declaration.

V. RICHARDS applied for a rule *nisi*, to set aside a judgment of *non pros.* for irregularity. The defendant had ruled the plaintiff to declare, and served a demand of declaration. The plaintiff obtained two rules for time to declare, the latter of which expired on the first day of the present term. The plaintiff not having declared on that

day, the defendant signed judgment of *non pros.* without another demand of declaration. That, I apprehend, is irregular. He should have made a second demand of declaration.

1832.
WELLS
v.
HARE.

TAUNTON, J.—If there has been once a demand of declaration, that is sufficient. When you obtain time to declare, you remain in the same situation when it has expired, as you were when you obtained it.

Rule refused.

SANDERS v. JONES.

April 30th.

WIGHTMAN moved for judgment on an old warrant of attorney, on the affidavit of a party, who stated that he had received a letter dated within the term, in the handwriting of the defendant. The letter was exhibited.

A letter dated within the term, from a defendant, is sufficient proof that he is alive, so as to authorize judgment on an old warrant of attorney.

TAUNTON, J.—That will do.

Rule granted.

JOHNSON v. JENKINS.

April 30th.

MANSEL applied for judgment on an old warrant of attorney. It had been originally given to confess a judgment to two persons; one had died; and the application was to have judgment entered up in favour of the survivor. He cited *Fendall* and *Others v. May* (a), where a warrant of attorney having been given to confess judgment to three, and one died, the Court permitted judgment to be entered up by the survivors.

On a warrant of attorney to confess judgment to two, judgment may be entered up in favour of a survivor.

TAUNTON, J.—You may take your rule. The judgment being here to be entered up *by* survivors, and not

(a) 2 Mau. & Selw. 76.

1832.
JOHNSON
v.
JENKINS.

against survivors, the authority of the warrant of attorney is thus substantially pursued.

Rule granted (a).

(a) See *Gee v. Lane*, 15 East, 1 Wils. 312; *Futcher v. Smith*, 2 592; *Todd v. Todd*, Barnes, 48, Sir W. Bl. 1301.
S. C. by the name of *Todd v. Dodd*,

May 3rd.

DE BODE's Bail.

If time to justify bail be granted, the defendant must pay the plaintiff's costs of attending to oppose. If the copy of the affidavit of sufficiency served on the plaintiff do not purport to be a copy, or do not state the names of the parties and the sums in the actions in which they are already bail, or the names of the occupants and numbers of the houses stated by the bail to be in their possession, these defects are not grounds for rejecting the bail, but for disallowing the defendant his costs of justification.

JEREMY applied for time to justify bail, as some accident had prevented the bail, of whom notice had been given, from justifying, and who had made the affidavit required by the 3rd Rule of T. T. 1 *Will.* 4.

TAUNTON, J., allowed time.

Dowling then applied for the costs of attending to oppose the bail.

TAUNTON, J.—Those costs must be paid before the bail justify.

Some days after, the same bail appeared to justify.

Dowling then opposed them, on the ground that the defendant had not complied with the third Rule of *Trinity* Term, 1 *Will.* 4(a). The copy of the affidavit of sufficiency, with which the plaintiff had been served, did not purport, by any thing which appeared on it, to be a copy of the original affidavit sworn by the bail. He cited *West v. Williams* (b) in support of his opposition. *Secondly*, the bail described themselves as being bail for other persons,

(a) *Ante*, p. 103.

(b) *Ante*, p. 162.

but did not state the names of the actions, nor the amounts of the debts in and for which they had become security, as required by the form subjoined to the above rule. *Thirdly*, the bail stated themselves to be possessed of certain houses, but they did not, as required by the same form, state the numbers and occupants of those houses.

1332.
DE BODE'S
Bail.

TAUNTON, J.—Those are not sufficient objections to authorize the rejection of the bail; but, if the bail should pass, they will deprive the defendant of the costs of justification.

Time was given to the plaintiff to inquire into the circumstances of the bail, and they were finally rejected.

TAUNTON, J., then allowed the costs of both the latter attendances of the plaintiff to oppose the bail.

Bail rejected.

SALMON v. JAMES.

May 3rd.

J. JERVIS moved for a rule under the 1 & 2 W. 4, c. 58, s. 6 (a), on the part of the Sheriff of *Montgomeryshire*, calling on certain persons to come before the Court to state their claims, in order that the Court might make such directions as should appear just for the settlement of their respective demands. He applied on an affidavit, which stated, that a writ of *fi. fa.* had been delivered to him, which he had executed. Whilst in possession, notice of several other writs having been sued out against the defendant's goods, and that the first execution creditor was not entitled to the whole amount levied, was given to him. Under these circumstances he applied for relief.

Where the Sheriff has levied under a *fi. fa.* and while in possession, he receives notice that other writs of execution have been issued against the defendant's goods, and that the first execution creditor is not entitled to the whole proceeds of the levy, the Sheriff is not entitled to relief under the 1 & 2 W. 4, c. 58, s. 6.

(a) 2 Dowling's Statutes, 571.

1832.
 SALMON
 v.
 JAMES.

TAUNTON, J.—The writ will be a sufficient justification to him for paying over the proceeds of the levy to the first execution creditor. What signify these notices? that is merely struggling for priority of claim. The case is not within the statute.

Rule refused.

May 3rd.

GATES v. TERRY.

Where issue has been joined in one term, and no notice of trial, the defendant cannot move for judgment as in case of a nonsuit in the next term, notwithstanding the rule 70, H. T. 2 W. 4.

BUSBY shewed cause against a rule for judgment as in case of a nonsuit. Issue was joined in *Hilary* Term last. The plaintiff did not proceed to trial, nor did he give any notice of trial. The defendant, therefore, was too soon in his application.

Ball, in support of the rule, cited rule 70 of *Hilary* Term, 2 W. 4, by which it was directed, that “no entry of the issue shall be deemed necessary to entitle a defendant to move for judgment as in case of a nonsuit, or to take the cause down to trial by proviso.” Before this rule, the practice was as laid down by Mr. *Tidd*(a): “the defendant cannot move for judgment as in case of a nonsuit, in town causes, the next term after that in which issue was joined, although it was joined early enough to enable the plaintiff to give notice of trial for the sittings after the preceding term; the plaintiff in such case having the whole of the next term to enter the issue, and no laches can be imputed to him till the term after.” Now that the necessity for entering the issue was removed, the necessity for waiting the time, which the plaintiff had for entering it, was removed also. There was now no occasion to wait the intermediate term given to the plaintiffs under the former practice.

TAUNTON, J.—All, I apprehend, which has been done by the new rule, is to remove the necessity of entering the issue. The practice in every other respect remains the same. Unless notice of trial has been given, you cannot move for judgment as in case of a nonsuit in the next term.

1832.

GATES
v.
TERRY.

Rule discharged, with costs.

BROWN v. RUDD.

May 3rd.

WHITEHURST shewed cause against a rule obtained by *Mansel*, for judgment as in case of a nonsuit. It was a country cause. Issue had been joined last *Trinity* Term, and notice of trial given for the next assizes, and it was made a *remanet*. The plaintiff resealed the record, and took it down at the following assizes, but gave no fresh notice of trial. The defendant's attorney, on that ground, refused to proceed. The plaintiff having once taken down the cause to the assizes, the defendant could not have judgment as in case of a nonsuit. He cited *Mewburn v. Langley* (a), and *Denman v. Bull* (b).

Where the plaintiff has taken a cause down to the assizes, and it is made a *remanet*, the defendant is not entitled to judgment as in case of a nonsuit.

Mansel, in support of the rule, contended, that, though the Court had by its act made the cause a *remanet*, and so the plaintiff was excused from trying the cause then, still it was his duty to try it at the earliest opportunity, which was at the next following assizes; and for that purpose to have given a fresh notice of trial.

TAUNTON, J.—I am of opinion, that this rule must be discharged, with costs. It is not necessary for me to decide, whether the plaintiff is bound to give a fresh notice

(a) 3 T. R. 1.

(b) 11 J. B. Moore, 443; S. C. 3 Bing. 499.

1832.

BROWN
v.
RUDD.

of trial, where a cause is made a *remanet*, because it has been determined in two cases, one in the *King's Bench*, and one in the *Common Pleas*, that, where a plaintiff has complied with the practice of the Court, by taking the cause down to trial at the assizes, and it is made a *remanet*, the defendant is not in a condition to move for judgment as in case of a nonsuit. This is the constant practice, from my own experience.

Rule discharged, with costs.

May 3rd.

LLOYD v. SMITH.

If a *latitat* be served in a wrong county, and it is sworn that the place of service is "full five miles from any part of the county" into which it issued, that is sufficient to set aside the service, without an affidavit, that, at the place of service, there was not any dispute as to boundaries, and that it was not on the confines of the county in which the service took place.

B. ANDREWS shewed cause against a rule obtained by *V. Richards* for setting aside the service of a *latitat*, and all subsequent proceedings, with costs, on the ground of irregularity. The irregularity consisted in the writ having been directed to the Sheriff of *Warwickshire* and served in *Staffordshire*. It was sworn that the place of service was "full five miles from any part of the county of *Warwick*." That was not sufficient, for the practice of the Court was to require an affidavit, stating, that there was no dispute as to boundaries, and that the place of service was not on the confines of the county (a).

TAUNTON, J.—It is clear, since the place is five miles from the nearest part of the county of *Warwick*, that there can be no dispute as to boundaries except by persons who are determined to create dispute.

Rule absolute, with costs.

(a) *Vide* Tidd's Forms, p. 179, s. 5, 9th ed.; *Storer v. Rayson*, 4 D. & R. 179; *Webber v. Manning*, ante, p. 24. See 2 & 3 Will. 4, c. 39, ss. 1, 20; 3 Dowl. Stat. pp. 138, 155.

1832.

OMARDON v. SNELLING.

May 4th.

PLATT shewed cause against a rule obtained by *Ball* for judgment as in case of a nonsuit. By the 69th rule of the first division of rules of *Hilary Term* (a), it is ordered, that "no motion for judgment as in case of a nonsuit shall be allowed after a motion for costs for not proceeding to trial for the same default." Here, the motion for costs was made last term, and therefore the defendant is not entitled to move for judgment as in case of a nonsuit.

Though the rules of *Hilary Term*, 2 Will. 4, did not come into operation until the first day of *Easter Term*, 2 Will. 4, it is irregular to move for judgment as in case of a nonsuit, after a motion for costs of the day for not proceeding to trial, for the same default under the 69th rule of the first division of rules of *Hilary Term*.

Ball, contra.—Those rules did not come into operation until the first day of *Easter Term*, and therefore, although the motion for costs was made in *Hilary Term*, the defendant was at liberty to move for judgment as in case of a nonsuit in *Easter Term*.

TAUNTON, J.—Here the motion for judgment as in case of a nonsuit was made after a motion for costs for the same default; and therefore, by the rule, the defendant is not at liberty to move for judgment as in case of a nonsuit. This rule must therefore be discharged, but without costs, because the motion for costs was made at a time when it could not be known that this rule would be made by the Court.

Rule discharged, without costs.

(a) *Ante*, p. 192.

1882.

May 4th.

JONES v. HARRIS.

Where a plaintiff recovers less than 40*s.* against a defendant, resident within the jurisdiction of the *Middlesex* Court of Requests Act, and his demand has not been reduced by set-off, the defendant is entitled to double costs.

THESSIGER shewed cause against a rule for entering a suggestion under the 23 *Geo. 2*, c. 33, s. 19, the *Middlesex* Court of Requests Act, to give the defendant double costs, the plaintiff having recovered less than 40*s.* in an action, the defendant residing within the county of *Middlesex*. The sum recovered was 1*l.* 18*s.* The distinction drawn by the cases is this:—Where the debt is originally above forty shillings, and it is reduced by partial payments, before action brought, below that sum, the claim is within the jurisdiction of the Court of Requests; but where it is reduced by a counter claim of set-off, at the time of the trial, the case is not within the act. Here, there was no plea of set-off, it is true, but the circumstances of the case shew that the demand of the plaintiff was cut down by a counter claim on the part of the defendant, and, therefore, the case comes within that class of decisions which determine that the defendant is not entitled to his costs. He cited *Pitts v. Carpenter* (a), *M' Colam v. Carr* (b), *Clark v. Askew* (c), *Horn v. Hughes* (d), *Chadwick v. Bunning* (e).

Platt, contrà, contended, that as there was neither plea nor notice of set-off in the present case, it must be taken that the plaintiff's claim only amounted originally to the sum for which the Jury had found their verdict. In *Chadwick v. Bunning*, where the action was originally brought for 9*l.* 17*s.*, Lord *Tenterden* observed—"In the absence of all authority, and adverting merely to the particular language of the statute, I should have come to the conclusion that this was a case in which, the plaintiff having recovered

(a) 2 Str. 1191.

(b) 1 B. & P. 223.

(c) 8 East, 28.

(d) 8 East, 347.

(e) 8 D. & R. 155; 5 B. & C. 532, S. C.

less than 40*s.*, although his original demand exceeded that sum, the defendant was entitled to double costs." The language of the statute clearly prevents any exception being raised in favour of the plaintiff; the words of s. 19 are, "if the Jury, upon the trial of such cause, shall find the damages for the plaintiff under the value of forty shillings, no costs shall be awarded to the plaintiff in such action, but the defendant or defendants shall be entitled to and recover double costs of suit." The finding of the Jury is, therefore, conclusive as to the defendant's claim to double costs. Here, less than 40*s.* damages were found for the plaintiff, and, therefore, the defendant is entitled to double costs. He cited *Warstel v. Atkinson* (a), *Jordan v. Strong* (b), and *Bateman v. Smith* (c).

1832.
JONES
v.
HARRIS.

TAUNTON, J.—On referring to Mr. Justice *Parke*, who tried this cause, it appears, that the plaintiff's demand was not reduced by a set-off. The question then is, whether the plaintiff's demand not having been reduced by a set-off, and a verdict for less than 40*s.* having been found in favour of plaintiff, the defendant is entitled to double costs. The cases of *Bateman v. Smith*, and *Chadwick v. Bunning* shew, that if the damages found by the Jury for the plaintiff are reduced to less than 40*s.*, in consequence of the original contract between the parties, or of part payments before action brought, the defendant is entitled to double costs under this act. But, if the plaintiff had an original demand against the defendant, exceeding 40*s.*, and for which a verdict must have been found at common law, before the statute, which gave the set-off, the case might be very different. It is not necessary, now, to give any opinion on that point; there are very good reasons why a case in which the plaintiff's demand is reduced by a set-off should be exempted from the operation

(a) 11 J. B. Moore, 14.

(b) 5 Mau. & Selw. 196.

(c) 14 East, 301.

1832.

JONES
v.
HARRIS.

of the statute. Those reasons may be found very pointedly and very strongly expressed in the case of *Pitts v. Carpenter* (a). The Court there observed—"How could the plaintiff tell whether the defendant could set off any thing in that action, so as to be bound to chuse that jurisdiction. Besides, he has in effect recovered 4*l.* 15*s.* 3*d.*; because a debt, which he must otherwise have paid, is now satisfied. Here are two causes determined, both of them of greater value than is within the inferior jurisdiction." But, as here there was neither notice nor plea of set-off, the plaintiff's demand could only have been reduced below the sum of 40*s.*, on the ground that the plaintiff's demand did not exceed that sum. As that is so, the rule must be absolute, to enter the suggestion prayed for by the rule.

Rule absolute.

Another case, in which the names of the parties were *Humphreys v. Amos*, under similar circumstances, and on the same statute, was decided during the term by *Taunton, J.*, in a similar manner.

(a) 2 Strange, 1191.

May 5th.

LILLY v. GOMPERTZ.

It is no objection to a writ, that it is made returnable on a day between the Thursday before and the Wednesday after Easter day, when they fall in Easter Term

TALFOURD shewed cause against a rule obtained by *Platt*, for setting aside a *latitat*, and all proceedings thereon, and delivering up the bail-bond to be cancelled for irregularity. The alleged irregularity was, that the *latitat* had been made returnable on the *Saturday* before *Easter* day. The question here arose upon the construction of the 11 *Geo.* 4 & 1 *Will.* 4, c. 70, s. 6, and the 1 *Will.* 4, c. 3, s. 3. The words of the former act were, "That, if the whole, or any number of the days intervening between

the *Thursday* before and the *Wednesday* next after *Easter* day shall fall within *Easter* term, there shall be no sittings in *banc* on any of such intervening days; but the term shall in such case be prolonged and continue for such number of days of business as shall be equal to the number of the intervening days before mentioned, exclusive of *Easter* day; and the commencement of the ensuing *Trinity* term shall, in such case be postponed, and its continuance prolonged for an equal number of days of business." The 1 *Will.* 4, c. 3, s. 3, provided, "In case any of the days between the *Thursday* before, and the *Wednesday* next after *Easter*, shall fall within *Easter* Term, then such days shall be deemed and taken to be a part of such term, although there shall be no sittings in *banc*." He submitted, that the latter act having made the intervening days in question "part" of the term, although no sittings in *banc* take place, a writ returnable on any of those days was regular. In the case of *Hall v. Welshman*, in the *Exchequer*, which was not yet reported, it had been decided that a writ made returnable on any of those days was regular.

1832.
LILLY
v.
GOMPERTZ.

Platt, *contrà*, contended, that, as the Court did not sit in *banc* on any of those intervening days, and consequently no judgment could be given on any of them, they were *dies non juridici*. He cited *Hemworthy v. Peppiatt* (a), wherein it was holden, that a bill of *Middlesex* made returnable on a *dies non juridicus* was altogether void.

Cur. adv. vult.

TAUNTON, J.—I have conferred with the other Judges, and we are all of opinion, that, under the late act of Parliament, those days, though not *dies juridici* for the sit-

(a) 4 B. & Ald. 288.

1832.
 LILLY
 v.
 GOMPERTZ.

tings of the Court in *banc*, are to be taken as part and parcel of the term; and therefore, that it was no irregularity that this *latitat* was made returnable on the *Saturday* before *Easter* day.

Rule discharged (a).

(a) See Reg. Gen. E. T., *post*. 1 Dowl. Stat. 371; & 2 Dowl. Stat. p. 9.

May 5th.

ROBINS v. RICHARDS.

A variance between the description of the form of action stated in the notice of the declaration, and in the declaration itself is an irregularity, but it is waived by the defendant taking the declaration out of the office.

N. CLARKE shewed cause, why the notice of declaration filed in this case should not be set aside, on the ground that the notice of declaration was of a plea of "trespass on the case," and the declaration was in "trespass." That would undoubtedly be an irregularity; but the defendant has waived it, by taking the declaration out of the office. It may be said, that the defendant could not become acquainted with the irregularity, without taking the declaration out of the office; but the fact is otherwise. The defendant, if he chooses to inquire of the clerk of the declaration, will be informed of what the nature of the action stated in the declaration is. As, therefore, he has an opportunity of becoming acquainted with the irregularity, without taking out the declaration, he has waived it by taking it out. This principle is recognized in *Gilbert v. Kirkland* (a), which is a case extremely similar to the present. There it was held, that where a plaintiff had declared conditionally, after the time for the defendant's appearing had expired, and the defendant took the declaration out of the office, it was a waiver of the irregularity. Mr. Justice *Parke* there said: "I have inquired as to the practice of the office, and find that the defendant has an

(a) *Ante* p. 153.

opportunity of seeing the exterior of the declaration. Now, he could have seen by the indorsement if it were filed conditionally, and therefore, taking the declaration out of the office, after an opportunity of seeing that indorsement, was a waiver." In point of principle, there is no distinction between that case and the present; and therefore the present rule must be discharged.

1832.
 ROBIN
 v.
 RICHARDS.

Alexander, contra, contended, that taking the declaration out of the office was no waiver, because the defendant had not an opportunity of seeing it before he took it out. The mere courtesy of the clerk of the declarations, in telling the defendant the nature of the action stated in the declaration, if he happened to ask the question, could not be considered a waiver, as there was no necessity imposed by law or practice on the officer to give the information.

Cur. adv. vult.

TAUNTON, J.—I have inquired as to the practice of the office, and I find, that, though it is not a matter of right to see the declaration, if the defendant asks the nature of the action, the information is never refused. The party might, therefore, have had the information on taking the declaration out of the office. As he might have had the information, the taking it out was a waiver of the irregularity.

Rule discharged.

1832.

May 5th.

Under Rule 69 of the first division of rules of H. T. 2 Will. 4, a default in not proceeding to trial pursuant to notice, cannot be connected with a default in not giving notice of trial, so as to prevent the defendant from moving for judgment as in case of a nonsuit, after a motion for costs of the day.

HYDE *v.* GARDNER.

V. RICHARDS shewed cause against a rule for judgment as in case of a nonsuit. Issue had been joined in *Trinity* Term, 1831, and notice of trial given for the *Summer* Assizes in that year. Costs of the day for not proceeding to trial were moved for, and obtained in the following term. The plaintiff gave no notice of trial for the *Spring* Assizes, and judgment as in case of a nonsuit on that ground was moved for. He submitted, that, under Rule 69 of the first division of Rules of *Hilary* Term, 2 Will. 4 (a), the present rule must be discharged. That rule directed that "no motion for judgment as in case of a nonsuit shall be allowed after a motion for costs for not proceeding to trial for the same default." Here, the defendant had already moved for and obtained the costs of the day for not proceeding to trial for the same default as that for which he had now moved for judgment as in case of a nonsuit.

TAUNTON, J.—That is not "the same default." The default of not proceeding to trial pursuant to notice, is very different from the default of not giving notice of trial. The defendant is certainly entitled to move for judgment as in case of a nonsuit.

Rule discharged, on plaintiff giving a peremptory undertaking to try at the next Assizes.

(a) 1 Dowl. Prac. Rep. 192.

1832.

DODD v. DRUMMOND, Gent., One &c.

May 5th.

BUTT moved to make a rule absolute on affidavit of service. The defendant was an attorney, and the rule was left with a laundress at the Chambers, she stating that she was authorized to receive notices and papers for the defendant.

Service of a rule on an attorney by leaving it with a laundress at his Chambers, who stated that she was authorized to receive notices and papers for him, is insufficient.

TAUNTON, J.—That will not do.

Rule refused.

THOMSON v. SMITH.

May 7th.

GODSON shewed cause against a rule for setting aside an interlocutory judgment, on the ground that the defendant was entitled to an imparlance, and, therefore, that the judgment had been signed too soon. By Rule 7, T. T., 1 Will. 4 (a), it is ordered, “that, upon every declaration delivered or filed on or before the last day of any term, the defendant, whether in or out of any prison, shall be compellable to plead as of such term, without being entitled to any imparlance.” In the present case, the writ was returnable on the first return of *Michaelmas* Term, and the declaration was of *Hilary* Term, and judgment was signed for want of a plea of that term. The rule of T. T., 1 Will. 4, therefore applied; and the defendant was entitled to no imparlance. In the *Exchequer*, in the case of *Eden-son v. Hoffman* (b), it was decided, that, “if the writ and appearance be of one term, and the declaration of another, the defendant is entitled to an imparlance, notwithstanding the late rule.” There, Mr. Baron *Bayley* said, in answer to an observation of counsel as to the depriving the

Where a plaintiff declares on or before the last day of any term, the defendant is not deprived of his imparlance by Reg. 7, T. T. 1 Will. 4, unless the process is returnable in the same term.

(a) *Ante*, p. 104.

(b) 2 C. & J. 140, and *ante*, p. 304.

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defendant of an imparlance, "that is, where the writ, appearance, and declaration are of the same term. Before the late rule, the defendant was not bound to plead as of the term in which the declaration was delivered, unless it was delivered on or before the fourth day exclusive before the end of the term in which the writ was returnable. By the rule, the last day is substituted for the fourth day before the end of the term." Although the authority of Mr. Baron *Bayley* is very high, it is impossible, by construction, to vary the express words of the rule. It would be very difficult to suggest words more general than those used in the rule:—*every declaration*—any term—all persons—and, therefore, the defendant was not entitled to an imparlance.

Shee, contra, submitted, that the construction put by Mr. Baron *Bayley* on the rule, was the correct one, the object of the rule being to prevent plaintiffs from being delayed in their remedy, when they were proceeding with due celerity, but not to favour those who were guilty of *laches*.

TAUNTON, J.—I am of opinion that this rule must be made absolute. Before the late rule of *Trinity* Term, the practice was this:—Where the process was returnable before the last return of the term, but the declaration was not delivered, or filed and notice thereof given, four days exclusive before the end of the term, if the defendant was in Court, he was entitled to an imparlance. Then came this rule of Court, "that, upon every declaration delivered or filed on or before the last day of any term, the defendant, whether in or out of any prison, shall be compellable to plead as of such term, without being entitled to any imparlance." All that this rule meant, was, to substitute the last day of every term for the fourth exclusive before the end of it. As, therefore, before this rule the defendant

was entitled to an imparlance where the process was returnable before the last return of term, and the declaration was not filed, or delivered and notice thereof given, the defendant being in Court; so, now he is entitled to an imparlance, if, in a similar state of circumstances, the declaration is not filed or delivered on or before the last day of the term. The opinion therefore of Mr. Baron *Bayley*, who is a Judge of long experience, and great learning in practical matters, appears to me correct. In fact, to deprive the defendant of his imparlance, the writ must be returnable, an appearance entered, and the declaration delivered or filed, in the same term. The defendant being therefore entitled to an imparlance, the judgment was wrong.

Rule absolute, with costs.

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RYLEY v. BOISSOMAS.

May. 7th.

PLATT shewed cause against a rule for setting aside proceedings for irregularity. The irregularity complained of was, that the amount of debt and costs had not been indorsed on the process according to the direction of 2 Reg. Gen. *Hil. T. 2 Will. 4, (a)*. The process here was an *alias* bill of *Middlesex*. He submitted that the rule only applied to process originally issued this term; as the rule did not come into operation till the first day of this term. The process here was not process originally sued out this term, but a continuation of process sued out before the rule came into operation. Besides, the terms of the rule were only directory.

2 Reg. Gen. H.
T. 2 Will. 4,
as to the in-
dorsement on
process of the
amount of debt
and costs de-
manded by
plaintiffs, is not
directory but
compulsory.

TAUNTON, J.—To say that it is only directory, is only in other words to say that it means nothing. This must be considered as an irregularity. We have determined

(a) *Ante*, p. 198.

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to treat the dereliction of it as an irregularity. It is a very important rule, and the object of it, which is to enable the defendant to pay debt and costs before any unnecessary expense is incurred, would be disappointed if this were not considered as an irregularity.

Rule absolute.

May 8th.

EVANS'S Bail.

The costs of opposing bail, who have complied with R. 3 T. T. 1 Will. 4, but are rejected, are granted as a matter of course to the plaintiff, unless some very strong ground is shewn on the part of the defendant, for putting in bail who could not justify.

COMYN opposed bail successfully, and applied for the costs of opposition, as a matter of course, under R. 3, T. T., 1 Will. 4 (a).

Platt, on the part of the defendant, submitted that the granting the costs of opposition was not a matter of course, but discretionary with the judge before whom the bail appeared.

TAUNTON, J.—It is a matter of course, unless there are very strong circumstances shewn on the other side.

Costs granted.

(a) *Ante*, p. 103.

May 8th.

SEARL v. JOHNSON.

Where a defendant is arrested on a *ca. sa.* and is afterwards removed from the custody of the Sheriff on process from the Court of Chancery into the Fleet, he is sufficiently charged in execution in the Fleet on the *ca. sa.* without bringing him up by *habeas corpus*, and charging him again in execution.

HUMFREY moved for a rule to shew cause why the defendant should not be discharged out of the custody of the Warden of the Fleet, as far as the cause of action in the present case affected him, on the ground that he had not been charged in execution on it in the Warden's custody.

Where a defendant is arrested on a *ca. sa.* and is afterwards removed from the custody of the Sheriff on process from the Court of Chancery into the Fleet, he is sufficiently charged in execution in the Fleet on the *ca. sa.* without bringing him up by *habeas corpus*, and charging him again in execution.

The facts of the case were these:—Judgment was signed against the defendant in last *Trinity* Term, and he was taken last *July*, on a *ca. sa.* returnable in the *Michaelmas* following. Before the return day of the writ, he was removed out of the Sheriff's custody into that of the Warden of the *Fleet*, on process from the Court of *Chancery*. The defendant was taken to the *Fleet* prison, and there still remained in custody on both charges; but without being charged in execution on the judgment in the present case. The defendant ought properly to have been brought up on a *habeas corpus*, before a Judge, and charged in execution on the judgment. Without being thus brought up, and charged in execution, he is not properly in the custody of the Warden. The judgment of Mr. Justice *Bayley*, in the case of *Rex v. The Sheriff of Middlesex* (a), which was cited by Mr. Justice *Littledale* in his judgment in *Goodman v.* — (b), contained these directions on the subject. "Where the party is not in the custody of the Marshal, but in the custody of the Warden of the *Fleet*, and is brought up by *habeas corpus*, for the purpose of being removed from the *Fleet* in order to be charged in execution in the *King's Bench*, the course of proceeding is, that the party is brought to the Judge's chambers, and the Judge makes out the *committitur* by *habeas corpus*." This course not having been adopted, the defendant never was properly in the custody of the Warden of the *Fleet*. He cited *Filks v. Allen* (c).

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TAUNTON, J.—The defendant was charged in execution on the *ca. sa.* at the time when he was removed to the custody of the Warden. If he had been arrested on a *capias ad respondendum*, you would have been right. The whole difference is on account of the nature of the process.

Rule refused.

(a) 1 Chit. Rep. 359.

(b) 1 Ante, p. 128.

(c) 2 Str. 1153.

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REX v. The Justices of DERBYSHIRE.

May 8th.

Where an order for altering the arrangement of the parishes, townships, &c. of any county for the convenience of holding special sessions has been made under the 9 Geo. 4, c. 43, ss. 2 & 4, there is no appeal against it: ss. 8 & 9 of that act applying to orders made under the authority of s. 7 only.

BALGUY and *N. Clarke* shewed cause against a rule obtained by *Clinton*, calling upon certain Justices of *Derbyshire* to shew cause why a *mandamus* should not issue, commanding them to hear the petitions of several townships in the said county, who considered themselves aggrieved by the order of the said Justices under 9 Geo. 4, c. 43. That act is intitled "An act for the better regulation of divisions in the several counties of *England* and *Wales*." The 1st section provides, "that, at any time or times after the *Michaelmas* quarter sessions next following the passing of this act, it shall be lawful for any two or more justices of the peace for any county, riding, or division, in *England* or *Wales*, having a separate commission of the peace, to transmit to the clerk of the peace, a statement in writing, signed by such justices of the parishes, tithings, townships, and places, within the same, which, in the opinion of such Justices, would form together a convenient and proper division, within and for which special sessions should thenceforward be held; or of any parishes, tithings, townships, or places, which, in the opinion of such justices, ought to be annexed for the same purposes to any other division in the said county than those or that of which, at the time of making such statement, they form a part; and that every such statement shall, among other things, set forth within what existing divisions or division, limits or limit, the several parishes, tithings, townships, and places, enumerated in the same, are situated or deemed to be; and also whether one or more and what existing divisions or limits will be altered by such proposed new divisions, or by the change of any place or places from one division to another; and also the names of such justices of the peace as at the date of such statement are usually resident or acting as such within

the boundaries of such proposed new division." By the 2nd sect. it is enacted, "that, at the quarter sessions next following the receipt of every such statement, setting forth such particulars as are above enumerated, and not otherwise, the clerk of the peace shall, and he is hereby required to, lay the same before such justices of the peace, in such sessions assembled; and the justices of the peace for such county, riding, or division, having such separate commission of the peace, shall, and they are hereby required (except in the cases hereinafter provided for) to, proceed, at the quarter sessions next following the laying of such statement before them as aforesaid, to the consideration thereof, and at their discretion to adopt the same wholly or in part, or to reject the same altogether, or to adjourn their determination thereupon to the next or any succeeding quarter sessions." The 3rd sect. provides, "that immediately after the quarter sessions at which such statement shall have been first laid before the justices of the peace, the clerk of the peace shall cause to be published a copy of such statement in three successive numbers of one or more weekly newspapers, usually published or circulated within the said county, riding, or division, and in which the advertisements of county business are usually inserted; and at the foot of such copy shall also cause notice to be given that such statement has been laid before such justices in pursuance of the directions of this act, and that the same will be taken into consideration by the Court at the then next ensuing quarter sessions." By the 4th sect. it is enacted, "that when and so often as the justices of the peace of any such county, riding, or division, having a separate commission of the peace, shall adopt wholly or in part any such statement so laid before them, and shall determine to change any parish, tithing, township, or place from one division to another, or to constitute any new division, within which special sessions shall thenceforward be holden, the said justices of the peace

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shall thereupon make an order for such alteration, or for the constituting and defining such new division; and in such last-mentioned order shall particularly enumerate the several parishes, tithings, townships, and places, to be comprised within such new division, and shall also specify the division or divisions within which, respectively, any parishes, tithings, townships, and places, disannexed by such order from any former division, and not forming part of such new division, shall thenceforward be taken to be; and also shall affix to such new division the name of some principal and convenient parish, township, or place, within the same, and also shall, in either of such orders, as the case may be, particularly set down the day from which such order shall take effect; and the clerk of the peace for such county, riding, or division, shall forthwith publish a copy of such order in three successive numbers of one or more such weekly newspapers as aforesaid, and shall transmit a copy of such order to every high constable within the limits of such new or altered division or divisions." The two next sections are only supplemental to the four first. All these six sections clearly apply only to orders made by the sessions, on the representation of two magistrates. By sect. 7, a much more extensive power is given to the sessions. The words of that section are,—“ That at the quarter sessions next after the laying of any such statement before the justices in such sessions assembled, it shall and may be lawful for such justices, if they shall deem it expedient and proper, not to proceed to the single consideration of such statement; but instead thereof, to cause to be made an inquiry and examination into the boundary lines, extent, and other local circumstances of all the existing and accustomed divisions for the holding of special sessions within the commission of such justices; and at such or any succeeding quarter sessions to which the conclusion of such inquiry and examination may from time to time be adjourned, by order of sessions, to regulate, alter,

new model and subdivide, all or any of such divisions, in such manner as shall appear to them proper and convenient, particularly specifying in such order the names of all such divisions, whether newly constituted, altered, or unaltered, the several parishes, tithings, townships, and places to be comprised in each, and affixing or continuing to each the name of some principal and convenient parish, township, or place within the same." The 8th sect. directs,—“ That the clerk of the peace for any county, riding, or division, in which such order shall have been made as last aforesaid, shall forthwith publish a copy of the same in three successive numbers of one or more such weekly newspapers as aforesaid, and shall also forthwith transmit by the post a copy of the same to the churchwardens and overseers of the poor of each parish within the said county, riding, or division, to be by them affixed on the principal door of the church of such parish; and, at the foot of every such copy so published or transmitted, shall add a notice, specifying at what time such order will be enrolled as hereinafter provided, and at what time and in what manner any person or persons, or body corporate, aggrieved by such order, may petition against the same, or any part thereof, as hereinafter provided.” The 9th sect. enacts,—“ That, in every such order, some time not earlier than the fourth quarter sessions next after the making thereof, shall be provisionally specified, on which the same shall be enrolled as hereinafter provided, subject to such alteration as may thereafter be made, either in the particulars of the said order, or in the time of its enrolment, and that, at any Court of quarter sessions preceding such time, it shall and may be lawful for any one or more person or persons, or body corporate, jointly or severally, to present a petition in writing to such Court against all or any part of such order, and to produce witnesses in support of such petition; and the justices in such Court assembled shall, and they are hereby required to hear and

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determine in a summary way, the merits of such petition, and to amend such order as far as may, upon such hearing, appear proper and convenient; provided always, that no such shall be received or examined into, unless after due proof that a notice in writing, specifying the grounds thereof, which, upon the hearing, shall alone be inquired into, hath been served ten clear days before the commencement of such sessions, upon one of the overseers of the poor, or the tithingman or constable, or two substantial housekeepers of the parish, tithing, township, or place respectively, as the case may be, wherein such petitioner or petitioners shall be resident at the time of presenting such petition, and also lodged twenty clear days before such commencement, at the office of the clerk of the peace, who shall, and he is hereby required forthwith to transmit a copy thereof to each of the justices usually acting within or for the district or places, or place named in such notice." By the 6th section,—“The former order is to be in force for twenty-one years;” and by the 10th section,—“The latter order is to be in force for ten years.” By the 10th section,—“This latter order is to be enrolled after the sessions.” In the present case, at a special sessions, held at *Tideswell*, of the justices acting for the hundred of *High Peak*, a statement of the places in the hundred which would, most conveniently to the inhabitants, form a new division, was prepared; the townships of *Hathersage*, *Outseats*, *Bamford*, and *Derwent*, were in the *High Peak* hundred, but, by mistake, not included in the statement. This statement was, according to the directions of the act, laid before the magistrates at the *Easter* sessions, and the regular notices given, that the sessions would take the statement into consideration at the *July* sessions. It was taken into consideration and adopted, leaving the four above-mentioned townships in the same division as before. The consequence of which was, that the inhabitants of those townships still had the same dis-

tance to travel to the special sessions as before, instead of a much shorter distance, which they would have had, if included in the new division. At the following *January* sessions, they accordingly presented a petition against this order. The magistrates conceiving they had no authority to receive it, refused to entertain it. The present application was therefore made to compel them so to do.—It is clear the magistrates have no authority to interfere. The power to appeal is confined by the act to orders made under section 7. The orders under the previous sections of the act are final. It is evident the Legislature contemplated two distinct orders. One is partial on the representation of two magistrates; the other is general, and may extend to the dislocation of the whole county. Each order is to be attended with formalities different from the other. The first order may come into effect immediately, while the latter order cannot come into effect until a considerable time after the sessions which made it. The former order is to be published in the newspapers, without any notice to the inhabitants of the townships, of the manner in which they may petition against it; but the latter order has such a notice. The former order is not to be enrolled; but the latter is. But, by the language of section 9, the words “such order” clearly apply to the order mentioned in section 7; and to that order the right of appeal is confined. The petitioners here are not aggrieved by the act; for, if they choose, they may appear at the sessions before the order is made, and point out in what way the modification proposed by the two magistrates will benefit or injure them. Having allowed that opportunity to pass, without availing themselves of it, they are precluded now from opposing the order. But the words of section 8, only give a right of petitioning to those who are “aggrieved” by such order. Yet how can these petitioners contend that they are “aggrieved,” since they are placed in no worse situation than they were previous to making the order?

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Clinton and Whitehurst, contrà.—Taking the act altogether, the intention of the Legislature was, to make no distinction between orders under ss. 2 and 4, or under s. 7. The *general* intention of the Legislature is to be considered in the construction of statutes, and that is to be carried into effect if possible. Now, it is manifest that the general object of the Legislature here was, that all persons who had cause to complain of, or object to the new division, whether of a particular district or of the whole county, should have some opportunity of being heard. Therefore, the words "*every* such order" in s. 9, must be taken distributively, as applying to *every* order made under the act. It is said, that the petitioners may appeal before the order is made. But they have no reason to appeal before then, because, until then, they are not aggrieved. Nor could they if they were, for there is no power of appealing in such cases given by the act. The only appeal clause is that in sec. 9. That the Legislature intended that there should be an appeal in the present case is manifest, for otherwise this absurdity would follow. It is admitted, that if this arrangement had been made for the general dislocation of the county, the petitioners would have a right to appeal. If that arrangement were a grievance, it would only last ten years. But the grievance arising from the present arrangement will last twenty one years. Therefore, if parties are to be aggrieved by an order for ten years only, they are to have a right of appeal. But if they are to be aggrieved for twenty one years, then they are to have no right of appeal. Again, before making the second order, the magistrates have great opportunity granted to them for consideration; and an appeal is given against an order after such consideration. But, against an order made without such consideration, there is no appeal: although it should seem much more important to have an appeal against an order made without consideration than against one made after consideration. And it must not be forgotten, that so far as

the *amount* of inconvenience any particular place may sustain by the division is concerned, it is perfectly immaterial whether it is made under the division of a particular hundred, or the dislocation of the whole county. Why then should the right of appeal be confined to one only? It is manifest, therefore, on viewing the whole act together, that the *general* intention of the Legislature was, to give the right of appeal in both cases; and, therefore, that *general* intention ought not to be controlled by some doubtful expressions to the contrary; and a *mandamus* ought to go, commanding the justices to receive the petition.

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TAUNTON, J.—I am of opinion, and my opinion is perplexed with no doubt, that this rule ought to be discharged. The object of the Legislature, as disclosed in the preamble, was to introduce better regulations with respect to the divisions of the several counties in *England* and *Wales*, for the purposes of special sessions. The 1st. sect. empowers two or more justices of the peace to send a statement of what they consider the most convenient arrangement with respect to the townships, parishes, &c., for the purpose of holding special sessions, to the clerk of the peace for the county. This statement, by sect. 2, is to be laid before the justices at the next sessions after the receipt of it; and at the following sessions the justices are to take it into consideration, and adopt or reject it, wholly or in part, according to their discretion. By sect. 3, after the quarter sessions, at which such statement has been laid before the justices, it is to be published in the county newspapers, with a statement that it will be taken into consideration at the ensuing quarter sessions. By sect. 4, the justices are to make an order, founded on the adoption, whether partial or entire, of the statement made by the magistrates, and in that order state the day when it shall take effect. By sect. 6, the order so made is to be in force twenty one years. The object of granting the time be-

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tween the sessions at which the statement of the magistrates was laid before the sessions, and the subsequent sessions at which it is to be taken into consideration, and also of the advertisements of the statement, must necessarily be supposed to have been to give to all parties who felt themselves interested, an opportunity of appearing at the sessions, and opposing or supporting what was to be done. All these sections relate to orders to be made on the statement received by the clerk of the peace from the magistrates; all persons having an opportunity of coming and complaining of what was to be done, or suggesting improvements. Then comes sect. 7; and it is said that the order contemplated by that section is the same as the order to which the previous sections relate. But it is utterly impossible that they can be considered as one and the same order. Under the former sections the quarter sessions had only power to adopt or reject the statement transmitted to them; but under the 7th sect. it has power to alter the whole arrangements of the county as to special sessions. For this purpose they must be considered as possessing an original jurisdiction. The words of sect. 8, "That the clerk of the peace for any county, riding, or division, in which such order shall have been made as last aforesaid," clearly refer to the order made under the authority of sect. 7, and not to an order made under the former sections. Under sect. 8, the clerk of the peace is to transmit, by the post, "a copy of the order to the churchwardens and overseers of the poor of each parish, within the said county, riding, or division, to be by them affixed on the principal door of the church of such parish." But the order under the former sections is only to be transmitted "to every high constable within the limits of such new or altered division or divisions." By sect. 8, a notice is to be placed, "at the foot of every such copy so published or transmitted, specifying at what time such order will be enrolled, and at what time, and in what manner, any person, aggrieved by such order, may petition against

the same; which is not the case with respect to the former order. The latter order is to be enrolled, but the former order is not. Sect. 9, gives a direct power to persons to petition against the latter order: but no such power is given against the former order. The latter order is to be binding, by sect. 10, for ten years; but the former order is binding for twenty one years. Nothing can shew clearer that these are separate and distinct orders, than prescribing two different periods for the operation of them. The one, which is of a limited operation, is to continue twenty one years in force; the latter, which is of extensive operation, is only to remain ten years in force. For these reasons it appears to me, that sect. 9, which gives a power of petitioning, only gives it against an order under sect. 7, which is adverted to in section 8. This being admitted to be an order under the former sections, the justices were right in refusing to hear this petition.

Rule discharged.

BIRCH v. BROWN.

CHANNEL shewed cause against a rule for a *habeas corpus* to the Sheriff of *Northampton*, commanding him to bring up the body of *Joseph Brown*, who was in his custody, on process issuing out of the Consistorial Court of *Northampton*, on the ground, that the Ecclesiastical Court had exceeded its jurisdiction, in the sentence pronounced on the defendant. The sentence was, that the defendant should, in the presence of the plaintiff, *Hannah Birch*, confess, that he had scandalously abused her, by saying, that she was in the family way and had miscarried; that he begged her forgiveness, and further to say—"And I believe her life and conversation to be sober, chaste, and honest." The objections are, first, that the Ecclesiastical Court has no power to sentence a defendant to express his belief as to the conduct of any com-

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The punishment for defamation is discretionary in the Ecclesiastical Court. Therefore, where a defendant was sentenced to acknowledge, that he believed the life and conversation of a woman whom he had defamed, to be "sober, chaste, and honest," at the time of doing the penance, the *K. B.* held, that the Ecclesiastical Court had not exceeded its jurisdiction.

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plainant; and, secondly, that, supposing it has such a power, such belief ought only to be expressed with respect to the conduct of the complainant at the time of the defamation uttered, and not at the time of performing the penance. As to the first objection, if it were any, it could only be urged by way of appeal, the offence being clearly of ecclesiastical jurisdiction. In *Rex v. Payton* (a), where an application was made to discharge a defendant out of custody and to quash a writ *de excommunicato capiendo*, on the ground, among others, that the party was only liable to the lesser excommunication, instead of the greater, Lord Kenyon observed, in his judgment—"That, if objectionable, is only the ground of appeal, it is merely, that the judge has not proceeded according to the proper forms of the Ecclesiastical Court." He also cited *Barne's* case (b). As to the second objection, the construction of the words of the sentence, shewed that the intention of the Court was, that the expression of belief as to the sobriety and chastity of the complainant's life, should apply to the time at which the offence was committed. But, whatever construction might be put on those words, the only mode in which that objection could become available, would be by appeal.

Humfrey, contra, submitted, that the jurisdiction of the Ecclesiastical Court had been clearly exceeded. If it had a right to require a defendant to state that he believed the complainant "chaste and honest," it would have equal power to require him to say, that he believed her to be "handsome," or "well made." Now the usual form of penance prescribed in 2 *Burn's Ecclesiastical Law*, 138, (ed.8), was this—"The defamer publicly pronounces, that, by such and such words (as are set forth in the sentence to have been spoken by him), he hath defamed the plaintiff; and, therefore, that he begs pardon and forgiveness,

(a) 7 T. R. 153.

(b) 2 Rolle's Rep. 157.

first of God, and then of the party defamed, for his uttering such words (a)." That was very different from expressing any belief as to the conduct of the complainant. He cited *Rex v. Dugger* (b), *Rex v. Thomas Jenkins* (c), *Rex v. Henry Maby* (d). But, whatever authority the Ecclesiastical Court might have to require the defendant to express his belief as to the complainant's conduct at the time of uttering the defamation, it could have no power to require him so to do as to the time of doing penance, to which the words of this sentence clearly referred. The name of the sentence, which was "reclamation," clearly only implied a recalling of the defamation uttered.

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Cur. adv. vult.

TAUNTON, J.—This was an application to discharge the defendant out of the custody of the Sheriff of *Northampton*, where he was, on a writ *de contumace capiendo*, issuing out of the Consistorial Court of *Northampton*, on the ground that the Ecclesiastical Court had exceeded its jurisdiction. The defendant had imputed incontinence to the plaintiff, who was a female, and she had libelled him in the Ecclesiastical Court. The sentence pronounced was, that the defendant should acknowledge that he had wrongfully imputed misconduct to her, and should also repeat these words—"And I believe her life and conversation to be sober, chaste, and honest." These words, it is contended, not only refer to the time when the scandal was uttered, but also to the time at which the acknowledgment was made. The argument was, that the Ecclesiastical Court had not power to enforce such an acknowledgment in the present tense. It appears to me, that there is no reason to find fault with the sentence of the Court on

(a) Oughton, 392, 3.

(c) 3 D. & R. 41.

(b) 5 B. & Ald. 791; 1 D. & R.

(d) *Id.* 570.

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that ground. If the sentence had been that the defendant should acknowledge, that she "was or had been" sober, chaste, and honest, at the time when the defamation was uttered, it might have been open to misconstruction. It might have been an additional insult by the implication, that he considered her no longer to be so. It is not, however, necessary for me to consider that. It was competent for the Court to enforce such an acknowledgment as that, because I find in the books respecting the jurisdiction of the Ecclesiastical Court, which is recognized by the stat. *Circumspecte Agatis* (13 Ed. 1, stat. 4), the punishment of defamation is to be enjoined at the discretion of the Judge (a). It is not a fixed penance, nor has it any particular *formula* of language. The Judge below having a discretion as to the amount and form of penance, and, as I think it is impossible to say that he has exercised his discretion improperly, the present rule must be discharged.

Rule discharged.

(a) 1 Ought. 391, 2.

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ROE v. The Sheriff of MIDDLESEX.

The Court will not set aside proceedings against the Sheriff, on an affidavit of merits made by an attorney, which only states that he believes that the defendant has a good defence to the action.

WHITE shewed cause against a rule for setting aside proceedings against the Sheriff, that the affidavit of merits only stated that the party making it "believes he has a good defence to the action."

TAUNTON, J.—That will not do. There may be good reasons for the party not wishing to swear *positively* that he has a good defence on the merits.

Rule discharged.

REEVES v. STROUD and Another.

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May 9th.

LLOYD shewed cause against a rule obtained by *Wightman*, for entering a suggestion on the roll to deprive the plaintiff of costs, under the *London Court of Requests' Act*, the 39 & 40 *Geo. 3*, c. 104, s. 12, on the ground that the plaintiff had recovered less than 5*l.* in an action brought in this Court. The sum for which judgment was signed, was 3*l.* 7*s.* 6*d.* The only question in this case is, whether the defendants are persons within sect. 5 of the act. The affidavits shew, that the defendants are partners as wine-merchants; that one carries on business in *Mincing Lane*, in the City of *London*, and the other at *Liverpool*; that the defendant *Stroud* has a counting-house in *Mincing Lane*, where the invoices are generally made out, dated "*London*," but wines are also kept at *Liverpool*, at which place the defendant *Wilkinson* lives. The words of the fifth section are—"Any person or persons whomsoever, residing or inhabiting within the city of *London*, or the liberties thereof, or keeping any house, warehouse, shop, shed, stall, or stand, or seeking a livelihood, or trading or dealing within the same city or liberties" (*a*). The defendants here keep a counting-house only in the city of *London*. But the word "counting-house" is not in the act, and the omission may well be supposed to have been designed, inasmuch as all the other words used import the possession of some effects in the city, which might be made available to satisfy debts. "Keeping a counting-house," therefore, does not bring the defendants within the act; and they must rest on the words "seeking a livelihood." Now, in *Kemsett v. West* (*b*), it was held, on the authority of *Stephens v. Derry* (*c*), that this would not bring the defendant within the protection of the act, un-

Partners keeping a counting-house only, for the purpose of receiving orders, in the city of *London*, and carrying on business at *Liverpool* also, are not within the provisions of the *London Court of Requests' Act*, the 39 & 40 *Geo. 4*, c. 104, s. 12.

(*a*) 1 Chit. Stat. 224.(*b*) 5 D. & R. 626.(*c*) 13 East, 161.

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less *London* was "the *only* place" in which "he sought his livelihood." Now, it is clear, from the facts stated in this case, that *London* is not "the *only* place in which" the defendants seek their "livelihood." They are, therefore, not within the act; and, therefore, the present rule must be discharged.

Wightman, in support of the rule, contended that this case was distinguishable from *Kemsett v. West*, of which, indeed, it was the converse, and that, under all the circumstances, the defendants must be held to be within the statute.

TAUNTON, J.—The defendants must either bring themselves within the letter of the statute, or shew that they obtain their entire livelihood within the city. They have only a counting-house in the city; and, in *Kemsett v. West*, that was holden not to be within the act. Then they do not obtain their entire livelihood in the city of *London*; for they carry on business principally at *Liverpool*, where the wines are, and only keep a counting-house for orders in *London*. They, therefore, carry on business at both places. In *Kemsett v. West*, it was holden, that, unless the city of *London* is "the *only* place in which" a defendant "seeks his livelihood," he is not within the statute. The present rule, therefore, must be discharged.

Rule discharged (a).

(a) See *Meredith v. Drewe*, 2 Moore & Scott, 225.

May 9th.

Where the words of a release, executed according to the directions of an award, might extend to a matter the parties did not intend the arbitrators to adjudicate upon, and on which they did not adjudicate, the generality of the words will be restrained by the intention of the parties.

UPTON v. UPTON.

DUNDAS shewed cause against a rule for setting aside a judgment signed, and execution issued against the defendant, on a *cognovit* given by him to the plaintiff. The facts of the case were these: *George Upton*, the defendant

the arbitrators to adjudicate upon, and on which they did not adjudicate, the generality of the words will be restrained by the intention of the parties.

in this case, entered into partnership, on the 21st *May*, 1827, with the plaintiff, *James Upton*, as an attorney. It was agreed, after some time, that the plaintiff should retire from the business, on condition of his receiving an annuity of 200*l.*, to be secured by the joint bond of the defendant and a Mr. *Blayden Thomson*, who was to enter into partnership with *George Upton*. The bond was accordingly executed. Disputes having afterwards arisen between the plaintiff and the defendant, on account of certain unsettled claims in respect of the former partnership, and the non-payment of the annuity pursuant to the agreement, two actions were commenced by the plaintiff, one for the alleged balance of account remaining unpaid since the dissolution of the partnership account, and the other for the arrears of the annuity. An agreement of reference was signed in the cause, relating to the balance of account; and a *cognovit* given in the action, for the arrears of the annuity. Both the agreement and the *cognovit* were executed on the 15th *June*, 1831. The agreement to refer was in these terms: "Whereas disputes have arisen between the said *James Upton* and *George Upton*, touching and concerning the accounts between them, and alleged to be due from one to the other of them, and it hath been agreed that the same shall be referred and submitted to the award and determination of *Benjamin Scott* and *William Smith*, of *Tadcaster*, gentlemen. Now, therefore, these presents witness, that, in pursuance of the said agreement, and for finally ending all questions and disputes touching the same accounts, and all matters in dispute between the said *James Upton* and *George Upton*, it is hereby mutually agreed by and between the said *James Upton* and *George Upton*, that the said accounts, and all matters in dispute between them, shall be and are hereby referred and submitted to the award and determination of the said *Benjamin Scott* and *William Smith*." The arbi-

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trators proceeded, but they took no notice of the annuity, as a matter in difference, at any of the meetings; nor was it ever mentioned, except by the defendant's attorney, who complained of its terms. The arbitrators, in pursuance of the reference, made their award, of which this was the principal clause: "And we do lastly award, order, adjudge, and determine, that, upon payment of the said sum of 88*l.* 10*s.* to the said *James Upton* as aforesaid, they, the said *James Upton* and *George Upton* shall and do respectively, at the costs and charges of the party requiring the same, sign, seal, and, as their respective acts and deeds, deliver, each unto the other of them, mutual general releases in writing of all and all manner of action and actions, cause and causes of actions, covenants, debts, specialties, controversies, clauses, and demands whatsoever, from the beginning of the world until the day of the date of the aforesaid agreement of reference." The sum directed having been paid, mutual releases, in exact conformity with the direction of the award, were executed. The annuity remaining in arrear, judgment on the *cognovit* was afterwards entered up, and execution issued against the goods of the defendant for the amount due. The present application has been made on the ground, that, by the general terms of the agreement of reference, the claim for the annuity was referred also; and the mutual releases, executed in conformity with the award, barred the plaintiff from proceeding on the annuity bond and the *cognovit*. The question, therefore, will be, whether the plaintiff has released the annuity, or the arrears of it. The language of the release is undoubtedly very large, but it is restrained by the intention of the parties. They only intended to release what had been referred to the arbitrators, and the action for the balance of accounts had alone been referred to them; therefore, only claims arising out of that action were released. He cited 2 *Rolle's Abridg.* 409 (A.), *Knight v.*

Cole (a), *Abree's case* (b), *Henn v. Hanson* (c), *Payler v. Homersham* (d), *Solly v. Forbes* (e), *Cole v. Gibson* (f), *Ramsden v. Hylton* (g), *Thorpe v. Thorpe* (h). But the release was only of all causes of action "until the day of the date of the aforesaid agreement of reference." The word "until" included the day so mentioned. The *cognovit* was given on the same day as the agreement of reference was signed, and therefore it was excluded from the operation of the release. He cited *Nichols v. Ramsel* (i), *Dixon v. Terry* (j), *Newmand v. Beaumont* (k), *Tuke v. Check* (l), *Trevil v. Ingram* (m), *Hawle v. Kirkeby* (n), 2 *Bac. Ab.* 404 (T.).

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Wightman, *contra*, contended, that the cases cited were beside the question here to be decided. The reference here is of "all" matters in difference between the parties. Under those general words, the dispute as to the annuity might have been taken into the consideration of the arbitrators. And, if it *might*, there are abundance of authorities to shew that it *ought*. Otherwise, the party is precluded from availing himself of it. In *Smith v. Johnson* (o), Lord *Ellenborough* observed: "Here is a reference of all matters in difference, and it appears that the sum in respect of which the deduction is now claimed, was a matter in difference at the time, and within the scope of the reference; notwithstanding which, the defendant contends that he was not obliged to bring forward the whole of his case before the arbitrators, but might keep back a part of it in order afterwards to use it as a set-off. But it was

(a) 1 Show. 150; 3 Mod. 277,
S. C.

(b) Hetley, 15.

(c) Siderf. 141.

(d) 4 Mau. & Selw. 423.

(e) 2 Brod. & Bing. 38.

(f) 1 Ves. 507.

(g) 2 Ves. 304.

(h) 1 Lord Raymond, 235.

(i) 2 Mod. 280.

(j) 4 Mod. 182.

(k) Owen, 50.

(l) Cro. Eliz. 897.

(m) 2 Mod. 281.

(n) Moor, 34, pl. 112.

(o) 9 B. & C. 780.

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competent to him to have brought the whole under the consideration of the arbitrators; and therefore I think that where all matters in difference are referred, the party, as to every matter included within the subject of such reference, ought to come forward with the whole of his case." He also cited *Dunn v. Murray* (a), and In the Matter of *Robson v. Railston* (b).

TAUNTON, J.—These cases shew that where there are matters in difference, all should be brought before the arbitrator, when the reference is general. But how does it appear that this annuity bond was a matter in difference, when it was so clear that the arrears on it were due, that the defendant gave a *cognovit* for them?

Wightman.—It must be considered as a matter in difference, since an action had been commenced on it for the arrears. Besides, the defendant's attorney complained of the terms of the bond. The arbitrators' attention was therefore called to it, and, being a matter in difference, it might have been taken into consideration by the arbitrators. If it was not taken into consideration, the party is still concluded by the award. The award concluding the the party as to the annuity bond, and the release being co-extensive with the award, it therefore released the defendant as to the annuity bond. If an action were brought on this annuity bond, a reference to this release, I submit, would be an answer to it, according to the cases I have cited.

TAUNTON, J.—The mere complaint of the defendant's attorney, that there was some hardship in the terms of the annuity bond does not at all shew that it was made a matter in difference, or drawn to the attention of the arbitra-

(a) 9 B. & C. 780.

(b) 1 B. & Adol. 723.

tor in that light. The execution and validity of the bond might have been admitted and agreed on; and therefore, if the argument that the complaint of the attorney as to the terms was calling the attention of the arbitrators to the bond as a matter in difference, it would go to shew, that any *obiter* complaint or remonstrance made by the attorney in the hearing of the arbitrator, was calling the particular subject of the complaint or remonstrance to his attention as a matter in difference. A man may have a mortgage or a bond outstanding, of which he may complain, but which is still so clearly against him that he never thinks of making it a matter in difference. I will look into the cases.

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TAUNTON, J., after recapitulating the facts of the case. The question is, whether the arbitrators took the arrears of the annuity into their consideration, and included them in the 88*l.* 10*s.*, and whether the release extends to the bond for the arrears of the annuity. It is perfectly clear, from the affidavits, that the arbitrators did not adjudicate on the arrears of the annuity, and that they did not include them in the 88*l.* 10*s.* they directed to be paid. Nor does it appear to me, from the agreement to refer, that the parties intended that the arbitrators should adjudicate on the annuity bond, or that it was ever brought to their attention as a matter in difference. They intended, by the agreement, to refer all matters in difference in the action brought to recover the alleged balance of account, and nothing more. It is not to be supposed they intended the arbitrators to adjudicate on the arrears of the annuity, when a *cognovit* had been given for those arrears on the same day as the agreement to refer was signed, and which arrears would consequently be no longer a matter in dispute. If the arbitrators omitted to take into their consideration any thing, which the parties intended they should, that

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might be a ground for setting aside the award. The words of the release are certainly general; but the case of *Payler v. Homersham* and *Solly v. Forbes* are clear authorities to shew that the general words of a release may be limited by the particular matter out of which the release springs, and the particular intent of the parties by whom the release is executed; and it is laid down as clear law in the cases cited by Mr. *Dundas*, that the general words of a release may be restrained by a particular recital. Then, if the intention of the arbitrators in awarding the release, though contained in general terms, was, that it should enure only to the particular matters referred to them, that is, to the causes of action which were matters in dispute, (the annuity bond being clearly no matter in dispute at that time, the defendant having given a *cognovit* for it), the general release would not refer to the annuity bond, and therefore did not include it. Though, if I looked to the release only, the words of it are sufficiently general to include the annuity bond. I am, therefore, of opinion that this rule must be discharged, and, as it was applied for contrary to good faith, with costs.

Rule discharged, with costs.

GRENFELL v. PIERSON.

In an action for slanderous words which are actionable only because spoken of and concerning the plaintiff in the way of his business, less than 40*s.* being recovered, the plaintiff is only entitled to the same amount of costs as damage under the 21 *Jac.* 1, c. 16, s. 6.

V. RICHARDS shewed cause against a rule obtained by *Follett* for reviewing the Master's taxation. The present was an action for slanderous words, and the Master allowed the plaintiff full costs. The question for the consideration of the Court is, whether, under the 21 *Jac.* 1, c. 16, s. 6, the plaintiff is entitled to full costs, or no more costs than damages; he having recovered less than 40*s.* The words of the section are: "that in all actions upon

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the case for slanderous words, to be sued or prosecuted by any person or persons, in any of the Courts of record at Westminster, or in any Courts whatsoever that hath power to hold plea of the same, if the Jury upon the trial of the issue in such action, or the Jury that shall inquire of the damages, do find or assess the damages under 40*s.*, then the plaintiff or plaintiffs in such action shall have and recover only so much costs as the damages so given or assessed amount unto, without any further increase of the same." The words in the present case were alleged to have been spoken of the defendant in a certain *colloquium* of and concerning the plaintiff in the way of his trade and business, and were: "Your accounts are as black as hell; you cheated me out of 3*l.* 3*s.* 10½*d.*; you are a rogue and a swindler." These words were varied in statement through a number of counts. No special damage was alleged. The rule laid down by decided cases is this. If the words are not in themselves actionable, but become so in consequence of the special damage they cause, then, however small the damages given by the Jury, the plaintiff will be entitled to full costs. On the other hand, if the words are actionable in themselves, although special damage is laid, and the damages are under 40*s.* he will be entitled to no more costs than damages. The present is a third case. The words here are not in themselves actionable, but become so from being spoken of and concerning the plaintiff, in the way of his trade and business. If there had been no *colloquium* of and concerning him in his trade and business, they could not, according to the cases, be actionable. As they are not actionable in themselves, but become so, as being so spoken of and concerning the plaintiff in the way of his trade and business, they can only be actionable on account of their producing special damage. Becoming actionable only in respect of the special damage produced, the plaintiff, according to decided cases, is entitled to full costs, whatever damages he may have recovered. The case

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of *Turner v. Horton* (a) would seem against this reasoning. But there, the words are not given in the report, and therefore, it did not appear whether they were actionable in themselves or not, although spoken of the plaintiff in the way of his trade; and *non constat* that the words were not actionable in themselves, although they were spoken in the way of the plaintiff's trade. If they were actionable in themselves, then the case would not touch me at all. For these reasons, I submit, that the plaintiff was entitled to full costs.

Follett, contra, cited the case of *Turner v. Horton*. There Lord Chief Justice *Willes* gave his judgment in these terms: "This comes on before the Court on a motion for full costs, notwithstanding the 21 *Jac.* 1, c. 15, s. 6. The action is an action on the case for words. There are eight sets of words in the declaration. The plaintiff sets forth that he is by trade a baker, and all the words are laid to be spoken of him in respect of his trade; and, as so spoken, all of them are actionable. Special damages are laid that two persons (naming them), who used to deal with the plaintiff and give him credit, refused to deal with him and give him credit, by reason of the speaking of these words. A general verdict was found for the plaintiff, and two-pence damages. The words of the 21 *Jac.* 1, c. 15, s. 6, are very strong, that, in all actions on the case for slanderous words there shall be no more costs than damages, if the verdict be for less than 40s. And if it were a new case, I should not be of opinion to take many of those (which have been determined to be) out of the statute. And I am now against going a jot further than the authorities will warrant, and think it best to adhere to some certain rule." Having reviewed the previous cases, he proceeded: "In the present case I shall say no more but that for the reasons already given, we

(a) *Willes*, 438.

think there ought to be no more costs than damages. Therefore, for the future, it is to be the settled rule of this Court that where the words themselves are actionable, and the damages are laid only by way of aggravation, if the verdict be under 40*s.* there are to be no more costs than damages. But, if the words be not actionable, and the special damages are laid, in which case they are the very gist of the action, and the plaintiff cannot recover without proving them, if the verdict be for the plaintiff, though the damages are under 40*s.*, the plaintiff shall have full costs." In the present case, as in that cited, the words must be considered as actionable in themselves, from being spoken of the plaintiff in the way of his trade. Here no special damage is laid; and if it were, it would only be as a matter of aggravation, and not as the gist of the action; and, therefore, could not entitle the plaintiff to recover more costs than damages.

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TAUNTON, J.—This was an action for slanderous words, and the question is, whether the plaintiff, having obtained a verdict for less than forty shillings, is entitled to full costs, or only to as much costs as damages. The Master taxed the plaintiff his full costs. The declaration, after the usual preamble, states, that the defendant, at the time of speaking the words in question, did use and exercise a certain trade and business: it then alleges the intent of the defendant to injure and prejudice him in his said trade and business, and that the defendant, in a certain discourse which he had with the plaintiff of and concerning the plaintiff in his said trade and business, did say these words, "your accounts are as black as hell; you cheated me out of 3*l.* 3*s.* 10*d.*; you are a rogue and a swindler." These are the words in the first count, and the same words are varied in statement in the other counts. It was admitted on both sides, that these words were only actionable in

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respect of their being spoken of the plaintiff in the way of his business. But it was contended by Mr. *Richards*, that as they are actionable only in consequence of their being spoken of the plaintiff in the way of his trade and business, they must be considered as actionable only in respect of the special damage which the plaintiff may receive in his trade and business in consequence of the speaking of those words. Now, the general rule is, that where the words are actionable in themselves, the plaintiff is entitled to no more costs than damages. That rule is laid down in *Berry v. Perry* (a), and in *Turner v. Horton* (b). Now here, the words are actionable in themselves as being spoken of a man in his trade (c). They are actionable in themselves in the same manner as words imputing an offence punishable by law. It was doubted, during the argument, what the words were in the case of *Turner v. Horton*, because the Chief Justice does not mention them in his report. I have, therefore, had the record examined and an extract made from it. There were eight counts in the declaration, and all the words were like the present, actionable in respect of being spoken of a man with reference to his trade and business. The extract is this:—

"In a certain discourse in the hearing of divers subjects,	}	He will break before Christmas.
In another discourse,		He will break before Christmas, and I will lay a wager of it.
In another discourse,	}	He will not keep his house till Christmas.
In another discourse,		He had nothing of his own, for it is his mealman's.
In another discourse with John Wheeler, a creditor,	}	If you don't give Turner trouble you will never get a penny of it.
In another discourse with Wheeler,		If you don't arrest him you will never be paid.
In another discourse with divers persons,	}	Turner will never hold it.
In another discourse,		Turner will never hold it; I will lay a wager that he will not hold it till Christmas."

(a) 2 Lord Raymond, 1588.

(b) Willes, 438.

(c) Com. Dig. tit. "Action on the case for defamation" (D.25.)

Now, all of these averments impute nothing but insolvency of circumstances, and therefore are only actionable in respect of their being applied to the plaintiff in his business; and the decision of the Court was, that the plaintiff should have no more costs than damages. Here, it is admitted, that the words on the speaking of which the plaintiff founds his action, were only actionable in respect of their being spoken of the plaintiff in the way of his business. The fact of no special damage being alleged makes no difference. There was special damage alleged and proved in *Turner v. Horton*. That makes a difference only where the special damage is the gist of the action. There, the Courts have held that the action is to be considered as for the damage, and not for the words. For these reasons, therefore, I am of opinion, that the case in *Willes* is not distinguishable from the present; and therefore, that the present rule must be made absolute for reviewing the Master's taxation.

Rule absolute.

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SKELTON v. SEWARD.

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MANSEL moved for a rule to shew cause why the Master should not review his taxation. The action was for a libel. Two classes of witnesses were subpoenaed by the plaintiff; the first to prove *innuendoes*, and the second to prove special damage. The Master has disallowed the costs of all the witnesses who were to prove the *innuendoes*. Now it is not the province of the Master to say that no witness is to be called to prove an *innuendo* in a libel, although he may disallow any of them he thinks proper.

The Master is in general sole judge of what witnesses shall be allowed on taxation, and therefore where he had, in an action for libel, disallowed all witnesses to prove *innuendoes*, the Court refused to interfere to make him review his taxation.

TAUNTON, J.—I am of opinion that no rule ought to be

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granted; and I wish it was better known to attornies, that the mode of taxing costs resides with the Master and not with the Judges of the Court. The Master is the proper officer of the Court to perform this duty, and in the performance of it he must use his own discretion; for it is utterly impossible to lay down any rules with such precision as to meet the circumstances of every case. The Master is to allow or disallow the costs of particular witnesses; and I think no part of his duty requires the exercise of so much discretion as the number of witnesses brought to trials at assizes. I think the discretion of the Master ought not to be brought into review, as a matter of course.

Rule refused.



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FORESTER v. DALE.

Trespass for breaking and entering plaintiff's close. Pleas, *lib. ten.* and four special pleas. Replication, issue on all the pleas, and a new assignment. Judgment by default on all the trespasses new assigned, and a relinquishment of the four last pleas, as far as they related to the new-assigned trespasses.

One shilling damages assessed on the judgment by default. Record went down for trial, and verdict found for plaintiff on the plea of *lib. ten.*, and for the defendant on all the other pleas:—*Held*, that as the defendant had left the plea of *lib. ten.* to the declaration on the record, the plaintiff was forced to go down to trial; and therefore was entitled to the general costs of the cause.

CAMPBELL shewed cause against a rule for reviewing the Master's taxation. The present was an action of trespass for breaking and entering the plaintiff's close. There was no general issue. The first plea was *liberum tenementum* in Sir George Chetwynd, under whom the defendant justified; the second, a public footway; the third, a public cart-way; the fourth, an easement for watering cattle at a pool in the close; the fifth, a right of common of pasture appurtenant to a certain other close. The plaintiff replied by taking issue on the various pleas, and new assigned, that the plaintiff brought his action, not only for the trespasses justified in the second, third, fourth and fifth pleas,

but for that the defendant broke and destroyed the trees, and entered the close for other purposes, and injured the land to a greater degree and extent than necessary. The defendant suffered judgment by default on the trespasses newly assigned, and relinquished his second, third, fourth, and fifth pleas, as far as they related to the trespasses newly assigned. The cause went down for trial, and a verdict was found for the plaintiff on the plea of *liberum tenementum*, and for the defendant on all the other issues; and 1*s.* damages were assessed to the plaintiff on the judgment by default to the new assignment. The Master allowed the plaintiff his costs of the issue on the plea of *liberum tenementum*, and of assessing the damages; and allowed the defendant his costs of all the other pleas, and of the witnesses in support of them. Setting off the costs on the one side against those on the other, left a balance in favour of the defendant, which the Master directed to be paid to him. The Master says, "that if the plea of *liberum tenementum* had not been on the record, he should have allowed the defendant the general costs of the cause." It is contended now, that the Master should have allowed the defendant the general costs of the cause, and only allowed the plaintiff the costs of assessing the damages on executing the writ of inquiry. It is perfectly clear, however, that the Master was quite correct in his taxation, both on principle and on authority. If there had been a general issue on the record, which had not been withdrawn, it is quite clear the plaintiff would have been entitled to all the costs of the trial, because the plaintiff is obliged by the plea of the general issue to go down to trial. He cited *House v. The Treasurer of the Commissioners of the Navigation of the River Thames & Isis* (a), *Vickers v. Gallimore* (b), *Longden v. Bourne* (c), and

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(a) 3 Brod. & Bing. 117.

(b) 5 Bing. 196.

(c) 1 B. & C. 278.

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Broadbent v. Shaw (a). Now the plea of *liberum tenementum* is only a special plea of not guilty; for if the soil and freehold of the close were in Sir *George Chetwynd*, it is clear no trespass could have been committed to the plaintiff's freehold: the plaintiff therefore was forced to go down to trial. It is indivisible; and therefore the issue, as to the new assignment, could not have been withdrawn by the plaintiff. The relinquishment by the defendant of the second, third, fourth, and fifth pleas, as far as they related to the trespasses newly assigned, was no relinquishment of the plea of *liberum tenementum*, as to the new assignment. The plaintiff therefore could not avoid going down to trial in that state of the record, and therefore he was entitled to the general costs of proving his case.

Whateley, *contra*, contended that the damages in this case might have been assessed before the Sheriff's jury; and therefore the plaintiff, not being obliged to go down to trial, could only be entitled to costs on executing the writ of inquiry.

PATTESON, J.—I have always understood the principle to be this, in the present state of the record, that, where a plaintiff might have withdrawn all the issues, because he must fail on them, except those on which judgment by default had been suffered, he is not entitled to any more costs on those issues on which he succeeds, than those to which he would be entitled on executing a writ of inquiry. But here, he could not have withdrawn the issue on the plea of *liberum tenementum*; and was obliged to go down to trial upon it. And why should he withdraw that issue, since it was the only one on which he succeeded? Then, he could not withdraw it in part, as to the new

(a) 2 B. & Adol. 940, and *ante*, p. 336. See also *Ruddock v. Smith* and *Others*, *post*, p. 467.

assignment, because the plea was indivisible. The present rule must therefore be discharged.

Rule discharged.

1832.
FORESTER
v.
DALE.

NORTHFIELD v. ORTON and MALE.

May 11th.

B. ANDREWS shewed cause against a rule obtained by *Kelly*, for enforcing the payment of 85*l.* by a Mr. *T.*, an attorney of the Court, pursuant to his undertaking. An action had been brought against the Sheriff and one of his officers, for seizing certain goods of a person named *Northfield*, at the suit of a Mr. *T.* Notice not to sell was given to the Sheriff. On application to Mr. *T.*, he gave his own undertaking as an indemnity, and the goods were accordingly sold. The action proceeded against the Sheriff, and the plaintiff ultimately obtained a verdict. The application now was, on the part of the Sheriff, to enforce Mr. *T.*'s undertaking summarily, on the ground that he was an attorney of the Court, and therefore liable to its summary jurisdiction. No case, however, went the length of deciding that the Court would interfere summarily to enforce the undertaking of an attorney who was a party in a cause, merely on account of his being an attorney. The undertaking here was not given as an attorney at all, for he was a party in the cause. The fact of his being an attorney was no ground for the summary interference of the Court, unless he had acted in that character when he gave the undertaking. He cited the case of *Walker v. Arlett*(a), where it was held, that an attorney, giving an undertaking for another in a cause in which he is not concerned as an attorney, will not be forced summarily to fulfil it, but the party to whom it is given will be left to his action.

An attorney, who is party in a cause, giving an undertaking to the Sheriff in that cause, is not liable to have that undertaking summarily enforced by the Court.

(a) *Ante*, p. 61.

1832.
 NORTHFIELD
 &
 ORTON.

Kelly, contra, submitted, that the Sheriff only accepted the undertaking on the ground of Mr. *T.* being an attorney; and, therefore, the Court might interfere to enforce it against him, without driving the party to the circuitry and expense of bringing an action.

TAUNTON, J.—The difficulty I feel is, as to the authority of the Court to interfere. I do not know of any instance, in which a party in a cause has been held to subject himself to the summary jurisdiction of the Court, merely on account of his being an attorney.

Rule discharged.

May 11th.

LEWELLIN v. NORTON.

A bill against an attorney is not "process" within the meaning of 2 *Reg. Gen. H. T. 2 Will. 4*, and therefore does not require the indorsement of the amount of debt and costs claimed, as directed by that rule.

THESIGER shewed cause against a rule obtained by *Kelly*, for setting aside a bill against an attorney, on the ground of the amount of the debt and costs claimed by the plaintiff not being indorsed on the back of it. The question is, whether a bill against an attorney is within the meaning of 2 *Reg. Gen. H. T. 2 Will. 4(a)*. It is certainly not a bailable writ or warrant; and although it may be admitted to be process, yet it is not the process contemplated by the rule, which uses the term to express serviceable process as distinguished from bailable. Besides, an attorney is not within the intention of the rule, as he must be taken to know the costs of the proceeding against him, the communication of which was one of the main objects of the rule.

Kelly, contra, contended that an attorney was as much within the mischief of the rule as any other person.

Cur. adv. vult.

(a) *Ante*, p. 198.

TAUNTON, J.—This was an application to set aside a bill filed against an attorney, on the ground that rule 2 of H. T. 2 *Will.* 4, has not been complied with. That rule is in these terms, “Upon every bailable writ and warrant, and upon the copy of any process served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff’s attorney claims for the costs of such writ or process, arrest, or copy and service and attendance to receive debt and costs; and that upon payment thereof, within four days, to the plaintiff or his attorney, further proceedings will be stayed.” The only question is, whether a bill filed against an attorney comes within the denomination of “process.” Now, I have a perfect recollection, that, in more instances than one, at Chambers, I have decided that a bill against an attorney did not come within the meaning of “process.” The other Judges have heard the objection taken to the proceeding in this case, and we all concur in opinion, that a bill filed against an attorney does not come within the denomination of process, and for this plain reason, that the object of process is to bring a defendant into Court; but a bill against an attorney supposes him to be in Court. The present rule must therefore be discharged.

Rule discharged.

1832.
LEWELLIN
v.
NORTON.

BOWDLER v. SMITH.

May 12th.

ON shewing cause against a rule obtained by the Sheriff, under the Interpleader Act, the 1 & 2 *Will.* 4, c. 58, s. 6 (a), on the ground, that, since he had seized under a

Where an adverse claim is set up to goods seized by the Sheriff, and the latter applies to the Court for

relief under the 1 & 2 *Will.* 4, c. 58, s. 6, and the adverse party does not appear to support his claim, the Court will bar his claim as to the Sheriff, and make him pay the judgment creditor his costs of appearing on the Sheriff’s rule, but will not allow the Sheriff his costs.

(a) 2 Dowl. Stat. 571.

1832.
 BOWDLER
 v.
 SMITH.

f. fa. issued against the defendant's goods, he had received notice of an adverse claim to the goods so seized: the adverse claimant did not appear, but the Sheriff and the judgment creditor appeared; the former to support his rule, the latter to resist the adverse claim.

Meeson, for the Sheriff.

Barstow, for the judgment creditor.

Cur. adv. vult.

TAUNTON, J.—The party making the claim here did not appear to support his claim; and the question now is, what is proper to be done? I have conferred with the other Judges on the subject, and they think that the rule obtained by the Sheriff should be made absolute, there being no cause shewn against it. The adverse claimant, therefore, is barred as against the Sheriff(s. 3). Then, as to the question of costs—The judgment creditor says it is very hard that he should be put to the expense of appearing on this rule, merely upon the false claim of a third person. The Court having looked at the act of Parliament, by which (s. 3) the costs are placed in its discretion, is unanimously of opinion that the rule should be made absolute, with the costs of the judgment creditor to be paid by the party making the claim. It is a rule, which was very early laid down, not to allow the Sheriff in any case his costs of coming to the Court, because it was thought that the act was sufficiently beneficial to Sheriffs without granting them their costs.

Rule absolute.

1832.

REX v. The Sheriff of MIDDLESEX.

May 12th.

CHANNEL shewed cause against a rule for setting aside an attachment against the Sheriff, on payment of costs. The affidavit on which the application was founded, does not state that the application is made for the indemnity of the Sheriff only, and at his expense. The rule of Court is, that "no rule can be drawn up for setting aside an attachment regularly obtained against a Sheriff for not bringing in the body, unless the application for such rule, if made on the part of the original defendant, be grounded upon an affidavit of merits; or, if made on the part of the Sheriff, or bail, or any officer of the Sheriff, be grounded upon an affidavit shewing that such application is really and truly made on the part of the Sheriff, or bail, or officer of the Sheriff, (as the case may be), at his or their own expense, and for his or their only indemnity, and without collusion with the original defendant (a)." These requisites not having been complied with, the rule must be discharged.

An affidavit to set aside a regular attachment against the Sheriff on payment of costs, must state that the application is made for the indemnity only and at the expense of the Sheriff.

TAUNTON, J.—The affidavit does not comply with the rule of Court, and is therefore insufficient. The rule must not be frittered away.

Rule discharged.

(a) 1 Tid. Prac. 316, ed. 9.

FRY v. MANN.

May 12th.

CHANNEL shewed cause against a rule for setting aside the verdict and all subsequent proceedings in this case,

A request by a defendant, that a notice of trial may be put

through his door, is no waiver of a personal service of notice of trial.

1832.

FRY
v.
MANN.

on the ground that no notice of trial had been given. The notice of trial had been put through the door of the defendant's office; and the defendant swore it had "never come to his hands, possession, or knowledge." It was, however, sworn on the part of the plaintiff, that the defendant had requested the plaintiff's attorney to put the notice of trial through the door of his office, for fear of alarming his wife; this was a sufficient waiver of the defendant's right to a personal service of the notice, without an acknowledgment of its having come to his hands.

TAUNTON, J.—That is not sufficient, unless you have an acknowledgment of its having come to his hands.

Rule absolute.

May 12th.

ALLEN v. MILLER.

Where a bill of exchange has been stolen, the Court will grant a rule to refer it to the Master to compute principal and interest, notwithstanding the loss of the bill.

ON an application to refer a cause to the Master, to compute principal and interest on a bill of exchange, without executing a writ of inquiry; it appeared that the bill had been stolen from the plaintiff's attorney's office, and therefore could not be produced. The case of *Brown and Others v. Messiter* (a) was cited. There, the Court referred it to the Master, to see what was due for principal and interest upon a bill of exchange, on the production of a copy of the bill verified by affidavit of the plaintiff's attorney, the original having been stolen out of his pocket, and no tidings of it gained.

TAUNTON, J., granted the rule.

Rule *nisi* granted.

(a) 3 M. & S. 281.

1832.

JOHNSON v. SMITH.

May 12th.

BURKE having moved to make a rule absolute for judgment as in case of a nonsuit for not proceeding to trial pursuant to notice, he applied for the costs of the day under 1 *Reg. Gen. H. T. 2 Will. 4, s. 69 (a)*, as a consequence of the rule being so disposed of by the Court.

Rule 69 of 1 *Reg. Gen. H. T. 2 Will. 4, s. 69*, does not enable the Court, where a rule for judgment as in case of a nonsuit for not proceeding to trial is made absolute, to grant the defendant the costs of the day, on disposing of that motion.

TAUNTON, J.—Those costs must be made the subject of a separate motion. The rule which you have cited only applies to cases where the rule is discharged.

Costs refused.

(a) *Ante*, p. 192.

HILLS v. SPILSBURY.

May 12th.

CHANNEL shewed cause against a rule, which required the defendant to shew cause why the plaintiff should not be at liberty to sue out execution, notwithstanding a writ of error brought, on the ground that the action was in *replevin*, and the note of allowance of the writ was in *trespass*. He submitted that an exact statement of the form of action was not material, as in every case, where *replevin* was brought, *trespass* might be brought also.

Where there is a variance in the description of the form of action between the note of allowance of a writ of error and the record, the plaintiff may sue out execution notwithstanding the writ.

TAUNTON, J.—They are materially different.

Rule absolute (a).

(a) See *Green v. Okill*, *post*, p. 422.

1832.

May 12th.

GREEN v. OKILL.

A note of the allowance of a writ of error is no stay of the plaintiff's proceedings, if it mis-describe the form of action.

BUSBY shewed cause against a rule for setting aside an execution, on the ground, that it had issued after a writ of error allowed. The action was *trespass*, and the note of allowance described it as *case*. That was such a variance as left the plaintiff at liberty to sue out execution.

Hutchinson supported the rule.

TAUNTON, J.—It strikes me that the cause of action must be correctly described in the notice of allowance, or the plaintiff will not be bound to take notice of the writ of error. An action of trespass is mis-described as an action on the case; though I do not know that the converse would be so, for case is a species of trespass.

Rule discharged with costs (a).

(a) See *Hills v. Spilsbury*, ante, p. 421.

May 12th.

ENGLEHART v. MORGAN, Gent. one, &c.

What will be circumstances sufficient to dispense with personal service of a rule.

BALL moved to make a rule absolute to refer a cause to the Master to compute principal and interest on a bill of exchange. The affidavit of service of the rule stated, that the party endeavouring to serve it, on going to the defendant's residence, had found a board stuck up, on which were these words, "Messages and Parcels to be left at" a particular place mentioned. The deponent went there, and saw a woman, who informed him she was in the habit of receiving messages and parcels for the defendant. He left the rule with her; and she afterwards said she had given it to the defendant. The affidavit also

stated, that the defendant had left his residence six weeks before, as the deponent believed.

1832.

ENGLEHART
v.
MORGAN.

TAUNTON, J.—That is sufficient.

Rule absolute.

REGULA GENERALIS.

DIES NON.

IT IS ORDERED that the days between the *Thursday* next before, and the *Wednesday* next after *Easter* day, shall not be reckoned or included in any rules, or notices, or other proceedings, *except* notices of trial and notices of inquiry, in any of the Courts of law at *Westminster*.

TENTERDEN,
N. C. TINDAL,
LYNDHURST,
J. BAYLEY,
J. A. PARK,
J. LITTLEDALE,
S. GASELEE,
J. VAUGHAN,

J. PARKE,
W. BOLLAND,
J. B. BOSANQUET,
W. E. TAUNTON,
E. H. ALDERSON,
J. PATTESON,
J. GURNEY.

END OF EASTER TERM.

Trinity Term.

IN THE SECOND YEAR OF THE REIGN OF WILLIAM IV.

1832.

May 26th.

In re JONES.

(*Before the Four Judges.*)

Where an attorney's bills are referred for taxation to the Prothonotary of the *Common Pleas*, he may refer items for business done in the *King's Bench*, to be taxed by the Master of the latter Court, and the *King's Bench* has no jurisdiction to interfere with that taxation of the Master, nor is the Prothonotary bound by it.

JUSTICE obtained a rule for reviewing the Master's taxation, under these circumstances:—The Court of *Common Pleas* had referred several bills of an attorney to the Prothonotary for taxation. Among the *items* charged in those bills was, business done in the Court of *King's Bench*. When the Prothonotary, in the course of his taxation, arrived at these items, he referred them to the Master of this Court. The Master allowed certain of those items, to which objection was now made.

V. Richards appeared to shew cause, and contended, that this Court had no jurisdiction to interfere in such a case. The sending those *items* by the Prothonotary to the Master was a mere matter of arrangement between those two officers; and the Prothonotary was not bound by the Master's mode of dealing with those *items*.

Per Curiam.—The Court certainly has no jurisdiction to interfere in this case.

Rule discharged without costs.

1832.

LAW v. STEVENS.

(Before the Four Judges.)

May 26th.

AN action was commenced in the *Palace Court*, and removed by *habeas corpus* into the *King's Bench*. Before the *habeas corpus* was returned, or bail put in by the defendant, the plaintiff delivered his declaration in this Court, indorsed conditionally, until bail should be put in and perfected, but also added on the declaration a demand of plea, according to Rule 43 of 1 *Reg. Gen. H. T. 2 Will. 4 (a)*. The defendant considering the demand of plea as a waiver of special bail, filed common bail, and pleaded the general issue to the declaration. After he had filed common bail, but before the plaintiff's attorney knew of the fact, the latter gave notice to the defendant, that the demand of plea was a mistake of his clerk, and therefore waived it. He then ruled the defendant to put in bail. This rule Mr. Justice *Taunton*, by order at Chambers, set aside, conceiving that the defendant was right. A rule to set aside this order having been obtained—

Where a cause is removed from an inferior jurisdiction by *habeas corpus*, and the plaintiff declares conditionally before special bail perfected, and indorses a demand of plea on his declaration, according to Rule 43, 1 *Reg. Gen. H. T. 2 Will. 4*, special bail is waived.

Kelly shewed cause, and—

Campbell and *Erle* supported the rule.

Per Curiam.—The defendant was right in filing common bail. The plaintiff could not, under such circumstances, abandon his demand of plea. The rule to set aside Mr. Justice *Taunton's* order must, therefore, be discharged.

Rule discharged.

(a) *Ante*, p. 188.

1832.

May 30th.

SMITH v. ELKINS.

Although a promissory note is not made payable to order, the Court will not grant a rule to change the venue on the common affidavit.

WIGHTMAN moved to change the venue in an action on a promissory note, on the common affidavit. The note was not payable to order, but on a particular day; it was, therefore, merely evidence of a promise by the defendant to the plaintiff, and therefore not within the statute (a). There were no particular circumstances in the case.

PATTESON, J.—The statute has been extended to charter-parties, to promissory notes, and bills of exchange. I do not like to make these nice distinctions. Unless you lay some particular circumstances before me, I cannot grant your application.

Rule refused.

(a) 6 Ric. 2, c. 2. See 1 Tid. Prac. 604, ed. 9; 2 Chit. Rep. 418, 419.

June 2nd.

BROWN v. GARDNER.

Where a defendant has surrendered in discharge of bail after trial, and the plaintiff has not charged him in execution within two terms after the trial, the defendant may be superseded, and cannot afterwards be taken on a *ca. sa.* issued on a judgment afterwards signed.

COMYN shewed cause against a rule for discharging a defendant out of the custody of the Sheriff, on the ground of the defendant not having been charged in execution in due time. The cause was tried at the *Spring Assizes*, 1831, and a verdict obtained by the plaintiff. In *Easter Term*, the defendant rendered in discharge of his bail. On the 15th *February*, 1832, the defendant was discharged out of custody, on the ground of the plaintiff's not having charged the defendant in execution within two terms next after surrender and due notice thereof. On the 2nd *May*, final judgment was signed by the plaintiff, and, on the 7th *May*, the defendant was taken on a *ca. sa.* He submitted, that although the defendant was entitled to be discharged, on account of the plaintiff's not proceeding to sign final

judgment after surrender, with notice; yet that, now the plaintiff had signed final judgment, the defendant was properly in custody.

1832.
BROWN
v.
GARDNER.

Nichol, contra, cited the words of the rule of H. T. 26 Geo. 3, K. B.—“In case of a surrender in discharge of bail, after trial had, or final judgment obtained, he (the plaintiff) shall cause the defendant to be charged in execution, within *two* terms next after such surrender, and due notice thereof, of which two terms the term of the surrender is also one.” The meaning of this rule clearly was, that, where there had been a trial, the two terms were to be calculated from it, and where there had been no trial, but a judgment, as in the case of a judgment by default, or on demurrer, the two terms were to be calculated from the latter. To shew that the “final judgment” mentioned in the rule meant final judgment without a trial, he cited *Heaton v. Whittaker* (a), afterwards cited in a note to *Wrigglesworth* and *Another v. Wright and Stacey* (b). The plaintiff not having charged the defendant in execution within two terms after trial, the defendant was entitled to his discharge.

PATTESON, J.—Upon this rule of H. T. 26 Geo. 3, it is quite clear, that, the surrender being after trial, the plaintiff must proceed to execution within two terms after trial or the defendant may be superseded.

Rule absolute:

(a) 4 East, Rep. 349.

(b) 13 East, 169, n. (a).

1832.

June 5th.

In serving a declaration in ejectment, it will suffice to read it over without explaining it, or to explain it without reading it over.

DOE v. ROE.

WIGHTMAN moved for judgment against the casual ejector. The affidavit of service on the tenant in possession stated the reading over of the declaration, without stating that it had been explained.

PATTESON, J.—That will do. It has also been held, that explanation without reading over will suffice.

Rule granted.

June 5th.

THOMSON v. BURTON.

The Court will not set aside service of *latitat* in *Middlesex*, without an affidavit that the service was not on the confines of the county, and that there was no dispute as to boundaries.

D. POLLOCK applied to set aside the service of a *latitat* directed to the Sheriff of *London*, which had been served in *Lincoln's Inn Fields*. The affidavit on which he moved, stated, that the place of service "was well known not to be within the city of *London*."

PATTESON, J.—That will not do, according to the practice of the Court, without an affidavit, that the place of service is not on the confines of the county into which the process is directed, and that there is no dispute as to boundaries.

Rule refused (a).

(a) See *Webber v. Manning*, D. & R. 179; and 2 & 3 Will. 4, c. ante, p. 24, and *Storer v. Rayson*, 4 39, ss. 1 & 20, 3 Dowl. Stat. 155.

June 6th.

BRYANT v. IKEY.

Where a *fi. fa.* has issued, goods seized under it, an adverse claim set up, the Sheriff has applied for relief under the interpleader act, and the execution creditor does not appear to support his *fi. fa.*, the Court will grant the costs of the adverse claimant's appearing to support his claim, to be paid by the execution creditor, but not those of the Sheriff: yet if the execution creditor afterwards appears and opens the rule, the Court will grant the Sheriff the costs of his second appearance.

CURWOOD appeared to shew cause on the part of an adverse claimant, on a rule obtained by the Sheriff under the interpleader act, the 1 & 2 Will. 4, c. 58, s.

6(a), calling on the execution creditor and the adverse claimant to appear before the Court, to submit to such order as the Court should direct. The Sheriff had seized goods belonging to the defendant under a *fi. fa.*; notice of an adverse claim on the property seized was given; and the Sheriff then applied to the Court for relief. The adverse claimant was ready to submit to any order which the Court might think it right to make; but the execution creditor did not appear. The adverse claim thus set up, therefore, remained absolute. The adverse claimant having been forced to appear before the Court in consequence of a *fi. fa.* issued, which the execution creditor did not choose to support, the latter was bound to pay the costs of the former.

1832.
BRYANT
v.
IKEY.

Clarkson appeared for the Sheriff.

PATTESON, J.—The adverse claimant having set up a claim on this property, which the execution creditor, by not appearing, admits to be well founded, the latter ought to pay to the former the costs of appearing here.

Clarkson then applied for the Sheriff's costs in appearing before the Court. He distinguished the present case from that class of cases in which the Court had been accustomed to refuse the Sheriff his costs, as they were generally those in which there appeared to be a *bonâ fide* execution on the one side, and a *bonâ fide* claim on the other. The Sheriff, in those cases, being relieved by the statute from the difficulty in which he was placed by such adverse claims, might, perhaps, appear not to be entitled to his costs. But here, the execution creditor had set the law in motion for a claim, which, by his non-appearance now, he confessed to be unfounded. The Sheriff, having thus

(a) See 2 Dowl. Stat. 571.

1832.

BRYANT
v.
IKEY.

been improperly forced to come before the Court, was entitled to his costs.

PATTESON, J.—If we say that we shall allow the Sheriff his costs, where the execution creditor or the claimant does not appear, to be paid either by the claimant or the execution creditor, then they will both appear, in order to save the expense of those costs; in which case we must go a step further, if we wish to decide adequately between the parties, and examine and determine whether the execution or the claim was frivolous. The judges have, therefore, thought it better to draw one strict line, and in no case to allow costs to the Sheriff.

On a subsequent day, *V. Richards* applied to open the Sheriff's rule, on the part of the execution creditor; notice of the application having previously been given to the Sheriff and the adverse claimant. A satisfactory reason having been given to the Court for the execution creditor's delay in appearing.—

PATTESON, J., allowed the Sheriff his costs of appearing on the second occasion, and directed an issue to be tried, between the execution creditor and the adverse claimant, and the costs of the application to depend on the event of that issue.

Rule absolute.

1832.

June 6th.

HODGE v. HOPKINS.

WIGHTMAN shewed cause against a rule for staying regular proceedings on the bail bond, on payment of costs. The only question was, whether the bail bond should stand as a security. He contended that it ought to stand as a security. The plaintiff had lost a trial after declaring conditionally, and the defendant had rendered after the time for perfecting bail had expired.

Where regular proceedings have been commenced upon a bail bond, and the defendant has rendered after the time for perfecting bail above, the Court will order the bail bond to stand as a security under rule 5, Reg. Gen. H. T. 2 Will. 4.

Busby, contra, cited 5 Reg. Gen. H. T. 2 Will. 4 (a), the words of which were "that upon staying proceedings, either upon an attachment against the Sheriff for not bringing in the body, or upon the bail bond, on perfecting bail above, the attachment or bail bond shall stand as a security, if the plaintiff shall have declared *de bene esse*, and shall have been prevented, for want of special bail being perfected in due time, from entering his cause for trial, in a town cause, in the term next after that in which the writ is returnable, and in a country cause, at the ensuing assizes." There, the defendant having rendered instead of perfecting bail above, the case did not come within the above rule, but was a *casus omisus*.

PATTESON, J.—Rendering is equivalent to perfecting bail above. In the case of render, there are still stronger reasons for the bail bond standing as a security.

Rule absolute, the bail bond standing as a security.

(a) *Ante*, p. 199.

1832.

CURWIN v. MOSELEY.

June 7th.

The Court will not set aside process, on account of the amount of debt and costs not being indorsed upon it, according to 2 Reg. Gen. H. T. 2 Will. 4, unless it appears on affidavit that the cause of action was a debt.

THOMAS applied for a rule *nisi*, to set aside process, on the ground that the amount of debt and costs demanded by the plaintiff was not indorsed on the writ, according to 2 Reg. Gen. H. T. 2 Will. 4 (a). He acknowledged that he was not prepared with an affidavit to shew what the cause of action was.

PATTESON, J.—You ought to have an affidavit, stating that the cause of action is a debt; for, if not, the rule does not apply.

Rule refused (b).

(a) *Ante*, p. 198.

(b) See 1 Reg. Gen. M. T. 3 Will. 4, s. 5, *post*.

June 7th.

In the Matter of SHARPE, Gent., One &c.

Trover against an attorney for deeds; cause referred; award, a nonsuit, and each party to pay his own costs:—*Held*, that the attorney had no lien on the deeds for the costs:—*Held*, also, that the attorney had no lien on the deeds for expenses incurred by him in consequence of applications made to him for the deeds.

BUTT obtained a rule *nisi*, calling on one *Daniel Sharpe*, an attorney of this Court, to give up certain deeds to the parties entitled to the property to which the deeds related.

Campbell shewed cause, and his affidavits stated that an action of *trover* had been brought by some of the parties who had obtained this rule against *Sharpe*, for the recovery of the deeds in question. The cause was referred to a barrister, who directed a nonsuit to be entered, and ordered each party to pay his own costs of the reference. *Sharpe*, in his affidavit, set up a claim to a lien on the deeds for the expenses attending the reference, and also for about 5*l.*, the costs to which he had been put by reason of the numerous applications made to him to deliver up the deeds. On these facts, it was contended, that the

attorney was not bound to give up the deeds, until he was well satisfied that the claimants had a good title to them; and that, in the present case, he had a right to hold them at any rate for the 5*l*.

1832.
In re
SHARPE.

Follett and *Butt* supported the rule.—The attorney cannot retain the deeds on the grounds mentioned. A lien can only arise by contract, either express or implied. There was no such contract in the present case. As to the expenses said to have been incurred by him, he could maintain no action for them, and therefore he can set up no lien for them.

TAUNTON, J.—I am of opinion that the attorney has no lien for the sums in question. As to the costs of the reference, that matter was in the discretion of the arbitrator; and he has disposed of it. And as to the other sums, I can see no pretence for saying, that he has a lien on the deeds for expenses so incurred. It is clear, he could not support an action for those expenses.

Rule absolute.

JONES v. HARRIS.

June 7th.

THESIGER shewed cause against a rule, calling on the plaintiff to deliver up the record in this case to the defendant, in order to enable him to enter a suggestion on the roll, to give the defendant double costs under the *Middlesex* Court of Requests' Act (a), the plaintiff having only recovered a sum of 1*l*. 18*s*. The record in this case is in the possession of the plaintiff's attorney, and the plaintiff does not know where the attorney is; the plaintiff, therefore, is quite unable to do what is required by the rule.

Where a defendant is entitled to enter a suggestion under the *Middlesex* Court of Requests' Act, the plaintiff is bound to find the record, or be answerable for the default of his attorney who withholds it.

(a) 23 Geo. 2, c. 33, s. 19.

1832.

JONES
v.
HARRIS.

Platt, contra, submitted, that the effect of the defendant being unable to obtain possession of the record, would be to deprive him of all benefit resulting from the authority which the Court had granted him to enter a suggestion for double costs.

PATTESON, J.—The plaintiff is answerable for his attorney. The present rule ought, therefore, to be made absolute. If he does not comply with it, and an attachment is moved for, we may hear his excuse then.

Rule absolute, with costs.

June 7th.

HART v. VOLLANS, Clerk. BIRNIE v. VOLLANS, Clerk.
GRAY v. VOLLANS, Clerk.

A defendant has no right to have a writ of *levari facias de bonis ecclesiasticis* returned, but may have a return of the amount of profits received by the sequestrator.

KELLY shewed cause against a rule for taking the Archbishop of York's return to a writ of *levari facias* off the file, issuing a *distringas*, and making the Archbishop pay the costs of the application. The application was made on the part of the defendant; and he states, that a sequestration issued against him, and that a sequestrator entered into possession of his benefice. After receiving the profits for some time, a sum of money came into the sequestrator's hands, from which he claimed deductions in his own favour. After this, the Archbishop was ruled to return the writ. His Grace did not return the writ, but returned the sequestrator's accounts. This return it was sought now to take off the file, on the ground, that objections existed to the sequestrator's accounts. In answer to this, we say, that though we are perfectly ready to put these accounts into a course of inquiry, the Court has no power to command the Archbishop to return the writ; for it is a continuing writ. If

the Archbishop were to return the writ, his authority would be at an end. He cited *Marsh, Knight, and Others v. Faucett, Clerk* (a). The marginal note of that case is this: "Though a *levari facias de bonis ecclesiasticis* is a continuing execution, and a levy may be made under it, from time to time *after it is returnable*, till the sum indorsed be satisfied, yet, if it be *actually returned*, the authority of the Bishop is at an end. Therefore, where such a writ remained in the hands of the Bishop long after it was returnable, who sequestered the profits of a vicarage accruing as well before the return day as after, and, being ruled to return the writ, returned only the amount of the sum levied up to the return day, the Court would not order the writ and return to be taken off the file, but would only permit the return to be amended, by inserting the sum levied up to the time when the writ was *actually returned*. The proper course of proceeding is to rule the Bishop from time to time, to know what he has levied." Whatever right, therefore, may be possessed to oblige the Archbishop to return what has been levied, the defendant can have no right to have the writ returned. If, at the suggestion of the defendant, the writ could be returned, and thus an end put to the execution, the situation of the plaintiff might be very much altered. The plaintiff might come to the Archbishop and say, that the writ had not been returned at his instance, for he wished the execution to continue.

PATTESON, J.—The defendant has no right to have the writ returned. The plaintiff has a right to put an end to his own execution, but the defendant has not.

Shee, contra, submitted, that he was entitled to have the

(a) 2 H. Black. 582. See also 1 D. & R. 486, and *Bennet v. Apperley, Clerk*, 9 D. & R. 673.
R. v. Bishop of London in a cause of *Flannagan v. Tomkins, Clerk*,

1832.

HART
v.
VOLLANS.

rule made absolute. The Archbishop had been ruled last term to return the writs of *levari facias* issued in these causes, and expressly to state in his return "what amount he had levied, and what had been the costs and charges of such levy." This rule was obtained on affidavits, stating, that the full sum indorsed on the writs had long since been levied, and that a balance remained in the hands of the sequestrator, who is the plaintiff's attorney: that balance he claimed to retain on account of a debt due to him by the defendant. Instead of obeying the rule, the Archbishop sent back the writs, with an indorsement on one of them, stating, that certain accounts, which he annexed, had been delivered into the Ecclesiastical Court of York, by the sequestrator. These accounts had been exhibited in a suit instituted in the Archbishop's Court by the defendant, to obtain a relaxation of the sequestration. It appeared from them, that the whole account indorsed on the writs had been levied, though they only came down to *January*, 1831, and the sequestrator took credit in them for sums to which he was clearly not entitled; they being due to him, if at all, on a private account between him and the defendant. The full Court were clearly of opinion, that this was no return at all, and thereupon granted the present rule. It was not doubted by the learned Judge (Mr. Justice *Taunton*), who granted the original rule, nor by the Judges in the full Court, that the defendant was entitled to call upon the Archbishop to return the writs, on an affidavit, that the sums indorsed upon them had been levied. There is no authority for saying, that the Archbishop is not compellable to return the writ of *levari facias* at the instance of the defendant. It is true that this is a continuing execution, and that is an additional reason why the defendant should have this remedy; for otherwise, the writ, unlike other writs, remaining in force after the return day, the sequestrator may continue in receipt of the profits of the benefice long after

the sum indorsed on the writ has been levied. There can be no injustice to the plaintiff in sanctioning the practice, for the rule can only be obtained on affidavits that the judgment is satisfied; and as the Archbishop is bound to levy the whole sum indorsed on the writ, the defendant's affidavits may be answered on shewing cause, and his rule made absolute, or discharged, on the usual terms. The case of *Marsh, Knight, and Others, v. Faucett, Clerk*, decides nothing contrary to this. There, no doubt, the proper course, that is, the most advisable course, would have been to rule the Bishop, from time to time, to know what he had levied: but that was a question of precedence between several judgment creditors; and the one whose writ had first issued, having taken away the authority of the Bishop by exacting from him a peremptory return, was thereby held to have lost his priority. In his case, therefore, it would have been wiser to have ruled the Bishop, from time to time, to return the amount of the sum levied. But no general rule upon the subject is, in that case, established, and it does not touch the question now before the Court. In the present case, nothing more, in fact, is wanted, than that the Archbishop should comply with the terms of the present rule, and enable the defendant to judge whether he has been fairly dealt with by the sequestrator, by furnishing full and satisfactory accounts up to the commencement of the present year.

PATTESON, J.—I am of opinion, that the defendant was not entitled as of right to call upon the Archbishop to return the writs. So much of the rule as relates to the *distringas* and to the costs must be discharged; and the Archbishop may amend his return, by stating what has been levied under the writs of *levari facias*, and what he claims to deduct for the costs and charges attending the levy.

Rule discharged.

1832.
HART
v.
VOLLANS.

1832.

June 7th.

If, during the five years, an articulated clerk has been absent two months, by consent of his master, at his father's house, and at the end of the five years has served two additional months, he will be entitled to admission.

Ex parte HUBBARD.

KELLY applied to admit an articulated clerk as an attorney, who had served the whole of his five years with the exception of two months: those two months he passed, by his master's consent, at his father's house. At the end of the five years, however, he served two additional months.

PATTESON, J.—I think that will do. He may be admitted.

June 8th.

JOHNSON's Bail.

A notice of justification, stating that the bail has "within the last six months resided," &c. is not sufficient under Reg. Gen. T. T. 1 Will. 4, s. 2.

MANNING opposed bail on the ground of a defect in the notice of justification. The notice stated, that the bail had "within the last six months resided," &c. This was insufficient under Reg. Gen. T. T. 1 Will. 4, s. 2 (a). That rule required, "that every notice of bail shall, in addition to the descriptions of the bail, mention the street or place, and number (if any) where each of the bail resides, and all the streets or places, and numbers (if any), in which each of them has been resident at any time within the last six months, and whether he is a housekeeper or freeholder." The words of this notice did not give any thing like the information required by the rule; for the words of it might be perfectly true, and yet the bail might not have resided at the place stated more than a single day.

PATTESON, J.—The notice is not sufficient.

Bail rejected.

1832.

Ex parte JONES.

ARCHBOLD applied to admit an articulated clerk as an attorney, under these circumstances:—Having been articulated, he served two years; he was then assigned for fifteen months; he was then re-assigned to his original master, and with him he served the remainder of his term. By some oversight he omitted to mention the name of the assignee in the notice of his intention to apply for admission. It was mere accident; and therefore it was trusted that the Court would allow him to be admitted.

June 8th.

If, during the five years, a clerk is assigned for a certain period, and at its conclusion re-assigned to his original master, the name of the assignee must be stated in the notice of the clerk's intention to apply for admission.

Cur. adv. vult.

PATTESON, J.—I have consulted the Judges in this matter, and they all think that the notice will not do. They are all of opinion that the notice should contain the name of every person with whom the clerk has served. If we once relax the rule, although this may be a hard case, we do not know where it will stop; for hard cases make *bad* law.

Rule refused.

BRACKENBURY v. NEEDHAM.*June 9th.*

FOLLETT shewed cause against a rule obtained by *Humfrey* for discharging the defendant out of custody, on filing common bail. It was an action of *trover*, and the defendant had been held to bail by a Judge's order. The present application was made on an affidavit, setting forth the peculiar circumstances under which the debt had been contracted. But those were merits, and into them the Court would not now inquire, where the arrest was by a Judge's order, any more than it would in any other case, where a defendant was held to bail upon *mesne* process.

Where a defendant has been arrested in an action of *trover* by a Judge's order, the Court will not enter into the question of merits for the purpose of discharging him, on filing common bail.

1832.
 BRACKENBURY
 v.
 NEEDHAM.

Humfrey, in support of the rule, contended, that the order to hold to bail was obtained entirely *ex parte*, and differed from the ordinary case of holding a defendant to bail on a claim, which entitled the plaintiff to arrest the defendant without having recourse to the discretion of a Judge.

PATTESON, J.—I cannot interfere in the present instance. I inquired into the merits of a similar case once; and I was told by the whole Court, that it was wrong for me to enter into the question of merits at all. I understand the rule to be quite strict.

Rule discharged, without costs.

Supra v. sub. d. f. b. c. p. 245.

June 9th.

REX v. KEALING.

Where a rule is made absolute for issuing a prohibition, the costs of the rule cannot be granted to the successful party under 1 *Will.* 4, c. 21, s. 1; that statute only applying to cases where there have been pleadings in prohibition.

WHATELEY applied for costs under 1 *Will.* 4, c. 21, s. 1 (a), on making a rule absolute for a prohibition. The words of that section were "Judgment shall be given that the writ of prohibition do or do not issue as justice may require; and the party in whose favour judgment shall be given, whether on nonsuit, verdict, demurrer, or otherwise, shall be entitled to the costs attending the application and subsequent proceedings, and have judgment to recover the same."

PATTESON, J.—It appears to me, that this section does not apply where there are no pleadings. Before this act, costs were not granted, except in cases where there were pleadings (b).

Costs refused.

(a) 2 Dowl. Stat. 37.

(b) 2 Tid. Prac. 948, ed. 9.

1832.

THOMSON v. PHENEY.

June 10th.

COMYN shewed cause against a rule for setting aside a notice of declaration, and all subsequent proceedings, on the ground that no process had been served. In answer to the application, the attorney for the plaintiff swore, that he had gone to the shop of the defendant, a bookseller in *Fleet Street*, and inquired if he were at home. The person in the shop told him that the defendant was at home, but engaged; he waited a considerable time in the shop, and while there, he frequently heard the defendant speaking in a room behind the shop; he at length informed the shopman what was his business, and offered him the process to give to his master. This he refused to do, but the deponent left the process with him, and came away from the shop. When he so left the process, the shopman said, "Mind this is no service." It was submitted, that this was sufficient service. It must be presumed that the process had come to the knowledge of the defendant. If it had, then it came within that class of cases, in which defendants had refused or avoided the taking of process into their hands, although it had been actually brought into their presence. Thus, it had been holden, that where a defendant had locked himself in and the process was put through a crevice in his door, the service was good.

The service of process, in order to entitle the plaintiff to file common bail for the defendant, must be personal.

PATTESON, J.—The plaintiff in this case, it appears, has declared conditionally. If the defendant should not appear, can the plaintiff make such an affidavit of service as will entitle him to file common bail according to the statute.

Comyn.—I apprehend he might make such an affidavit on this state of facts as would entitle him to file common bail for the defendant. He cited the case of *Rhodes v. Innes (a)*, where the father eluded service of process and service on the son who said his father was in the house, and

(a) 5 M. & P. 153; S. C. 7 Bing. 329; ante, p. 215.

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THOMSON
v.
PHENEY.

should receive the writ, was held equivalent to personal service on the father.

Cur. adv. vult.

PATTESON, J.—In this case, I have made inquiries at the office of common bails, what is the course pursued where a plaintiff files common bail for a defendant; and I understand, that a practice has crept in, that the party seeking to file the common bail, brings an affidavit of any kind or sort, which states, that the defendant has been served personally, and then sets forth the particular mode of service which is not personal service at all. It is then pointed out to the party producing the affidavit that the service is not personal, but nevertheless he is allowed to file common bail; leaving it to the other side to appear and set it aside. This course of proceeding is exceedingly improper, and I have given directions that it shall be discontinued for the future. From the affidavit of service in the present case, there is nothing from which it appears that the process was brought to the personal knowledge of the defendant. All that is there stated merely amounts to an attempt to serve the defendant. In a case (a) decided by Mr. Justice Taunton in the last term, several attempts were made without success to serve the defendant personally. There, however, Mr. Justice Taunton would not allow the service to be good, although it was quite clear that the defendant wilfully avoided service. A case in the *Common Pleas*, of *Rhodes v. Innes*, has been mentioned, where common bail had been filed by the plaintiff, after an affidavit of special service, and the Court refused to set aside a common appearance, although it was understood that a strictly personal service had not been effected. In that case, however, the decision of the Court depended on the peculiar circumstances stated in the affidavits, and there was no doubt there that the process had come to the defendant's hands. But great danger may arise, if once the officer of the Court is allowed to receive and act upon an affidavit not within the statute, and file common bail at his own dis-

(a) *Digby v. Thomson*, ante, p. 363.

cretion. It is true, that, subsequent to the time of that case, an application was made by Mr. Pitt, in person, for the purpose of rendering a special service equivalent to a personal service, so as to enable him to enter an appearance for the defendant according to the statute. He stated several circumstances, shewing attempts on the part of the defendant, against whom he applied, to avoid service. The Court took time to consider, but refused his rule. That case is quite inconsistent with the practice of the office. I think that there ought to be an affidavit of personal service, in order to entitle the plaintiff to file common bail. All the other Judges are of the same opinion. Now, the question is, could the deponent in this case have made an affidavit of personal service? I think he could not. I do not mean to say, that it is necessary to leave the process in the actual corporal possession of the defendant; for, whether the party touches him or puts it into his hand, is immaterial for the purpose of personal service. Personal service may be, where you see a person and bring the process to his notice. It seems to me better to hold the rule strict, in authorizing a plaintiff to enter an appearance for a defendant. I am quite of opinion, that in this case there are not sufficient facts to warrant any man in making an affidavit of personal service. If the deponent had informed the defendant of the nature of the process, and thrown it down, that would do. Then the question is, whether I should set aside this declaration? As the declaration has been filed *de bene esse*, it is of no use, unless the plaintiff could file common bail: now he could not do so. I think, therefore, that this rule ought to be made absolute, but without costs.

Rule absolute, without costs (*a*).

(*a*) Since the passing of the 2 & 3 W. 4, c 39, the provisions of s. 3, as to *distringas*, will prevent the necessity of a personal service, in order to obtain judgment against a defendant who keeps out of the way. See 3 Dowl. Stat. 145-6. Where a personal service can be effected, the Courts will, no doubt, be very strict in the requisites of the affidavit of service.

G G 2

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THOMSON
v.
PHENEY.

1832.

June 10th.

If a plaintiff alarm bail who have been put in, and thus prevent them from justifying, the Court will compel him to pay the costs of putting them in.

GWYNNE, Gent. one &c. v. FULLER.

HUTCHINSON shewed cause against a rule obtained by *Busby*, for compelling the plaintiff to pay the costs of putting in three different sets of bail on the part of the defendant. The plaintiff, it appeared, had gone to the bail after they were put in, and, by stating to them the danger they incurred by becoming bail for the defendant, who was a prisoner, so alarmed them, that they refused to appear to justify. The consequence was, that the defendant had been forced to put in fresh bail.

PATTESON, J.—The rule must be made absolute. The plaintiff has no right to go and make use of any inducement to prevent the bail from appearing to justify. He has only a right to make inquiries into their sufficiency.

Rule absolute, with costs.

June 10th.

BAINBRIDGE v. PURVIS.

Where a default in proceeding to trial has been made by a plaintiff, but the defendant does not move for judgment as in case of a nonsuit until after fresh notice of trial, he is still entitled to his judgment. In all cases of peremptory undertaking, though the cause may be in the paper, a fresh notice of trial must be given.

PLATT shewed cause against a rule for judgment as in case of a nonsuit. Notice of trial was given for *Michaelmas* Term, 1831, and the record withdrawn. The cause was afterwards set down for the Sittings after *Easter* Term, 1832, and notice of trial given. Judgment as in case of a nonsuit was moved for in *Trinity* Term, 1832. The defendant should have applied before fresh notice of trial given; and not having so applied, he has waived the default. The defendant, therefore, is not entitled to have his judgment. The cause is still in the paper, and several hundred off.

PATTESON, J.—It is no answer to this rule, that you

have given notice of trial before application made for judgment as in case of a nonsuit. The rule must therefore be made absolute, unless you give a peremptory undertaking to try at the Sittings after this Term. You must also give fresh notice of trial, although the cause is in the paper. This was decided by Mr. Justice *Little-
dale* in the case of *Sulsh v. Cranbrook* (a).

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Rule discharged, on plaintiff's giving a peremptory undertaking to proceed to trial at the Sittings after *Trinity* Term.

(a) *Ante*, p. 148.

BANTING v. JADIS.

June 11th.

CURWOOD shewed cause against a rule for cancelling the bail bond, on the ground of a defect in the affidavit to hold to bail. It was an action by an indorsee against a drawer of a bill of exchange. The alleged defect in the affidavit to hold to bail was, that no default by the acceptor was stated in it. Such a statement was not necessary. He cited *Bradshaw v. Saddington* (a), and *Elstone v. Mortlake* (b).

In an action by an indorsee against the drawer, the affidavit of debt should allege the default of the acceptor.

Steer contended that it was necessary to state the default of the acceptor, as was decided in the case of *Buckworth v. Levy* (c), afterwards recognised in *Cross v. Morgan* (d).

PATTERSON, J.—I think my Brother *Littledale* was right

(a) 7 East, 94.

(b) 1 Chit. Rep. 648.

(c) 7 Bing. 251.

(d) *Ante*, p. 122.

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 BANTING
 v.
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in his judgment in *Cross v. Morgan*, but I will mention the point to the other Judges.

Cur. adv. vult.

PATTESON, J.—I have conferred with the Judges in the other Court, and they are clearly of opinion, that the decision of my Brother *Littledale* is correct.

Rule absolute.

June 12th.

WEBB'S Bail.

4 Reg. Gen. T. T. 1 *Will.* 4, which entitles defendants to have the recognizance entered into under R. 3, if no exception be entered by the plaintiff, out of Court, without further justification, does not apply to the case of a prisoner.

TURNER, on the coming up of bail to justify, contended, on behalf of the defendant, who was a prisoner, that he was entitled to have the recognizance of bail out of Court, under rule 4 *Reg. Gen. T. T. 1 Will.* 4, without further justification: the bail having made the affidavit of justification prescribed by rule 3 of the same term, which had accompanied the notice of bail, and the plaintiff not having given notice of exception.

V. Richards contended, that the rule did not apply to the case of a prisoner, as there it was not necessary to except in order to compel justification.

PATTESON, J.—This rule does not apply to the cases where notice of exception is not necessary. It is not necessary in the case of a prisoner, as there the bail must justify without exception. The defendant is therefore not entitled to have the recognizance out of Court, without further justification.

Bail justified.

1832.

HIGGINS v. WILKES.

June 12th.

V. RICHARDS applied to enter up judgment on a writ of *sci. fa.* against bail under rule 81 of 1 *Reg. Gen. Hilary Term, 2 Will. 4.* The words of that rule were, that "no judgment shall be signed for non-appearance to a *sci. fa.* without leave of the Court or a Judge, unless the defendant has been summoned; but such judgment may be signed by leave after eight days from the return of one *sci. fa.*" The affidavit on which he moved stated that the *sci. fa.* had been issued on the 19th of *May*; that the Sheriff returned "*nihil*," and that no common bail had been filed although eight days had expired.

The Court will not allow judgment to be signed for non-appearance to a *sci. fa.* against bail unless it is shewn that the bail have been summoned, or that efforts, and what efforts, have been made to summon them.

PATTESON, J.—Your affidavit should state that the bail had been summoned, or that efforts had been made to summon him, and what those efforts were.

Rule refused.

LAMB v. PEGG.

June 12th.

WIGHTMAN shewed cause against a rule for setting aside a *latitat*, on the ground, that the action was brought before the credit on which the goods were sold had expired. He had an affidavit, the effect of which was, that the credit had expired before the action was brought; these were merits which the Court would not try on motion. There was the case of *Kerr v. Dick (a)*, in which an action was brought on a bill of exchange before it was due, where the Court interfered, as was required by

Unless it is perfectly clear that an action is brought for goods sold and delivered before the stipulated credit has expired, the Court will not set aside the writ on motion.

(a) 2 Chit. Rep. 11.

1832.

LAMB
v.
PEGG.

the present motion. In that case it was quite clear, that the credit had not expired, and, therefore, there was a ground for the Court interfering. But here it was a disputed point between the parties; it was merits, and those the Court would not try on motion.

Busby, contra, cited the case of *Kerr v. Dick*, as precisely in point, and contended, that the defendant would be subjected to great hardship if the Court would not relieve him thus on motion; for, if the cause went down to trial, the defendant would not be at liberty to shew that the cause of action accrued after the writ had issued, provided it accrued before bill filed (a).

PATTESON, J.—This is merely an experiment, and I cannot encourage it. Unless it clearly appears that the party has been arrested before the period of credit had expired, I cannot interfere. My discharging this rule does no harm to the defendant, because, if the credit really had not expired before the action was brought, it will be a good defence to the action. It is, however, disputed that the period of credit has expired; and therefore, were I to go into the question on the affidavits, I should be trying the merits of the cause on motion.

Rule discharged, with costs.

(a) *Best v. Wilding*, 7 T. R. 4; *Swancott v. Westgarth*, 4 East, 75.

June 13th.

PRICE v. HUGHES.

A judgment signed on a warrant of attorney between the assign day and

the first day in full term of the term subsequent to the death of the defendant is regular; the three days previous to the day provided by the 11 Geo. 4, & 1 Will. 4, c. 70, s. 6, for the commencement of the term being now no part of the term.

ROBINSON shewed cause against a rule for setting aside a judgment and execution on a warrant of attorney,

on the ground that the judgment had been signed irregularly. The facts of the case were these—The warrant of attorney to confess judgment was given by the defendant on the 7th of *April*, 1828. The defendant died on the 13th of *April*, 1832. Judgment was signed on the day following, as of *Hilary* Term in that year, the officer indorsing the day when the judgment was actually signed. The essoign day of *Easter* Term was the 12th of *April*, and the first day in full term was the 15th. The objection was, that the judgment being signed after the essoign day, was irregular. He submitted that the judgment was regular: First, the course taken by the plaintiff was admitted to be consistent with the present practice of the office; and that it is not a *new* practice appears from *Prigmore v. Bradley*(a), where that practice was admitted as having been established. Nor was the practice unreasonable, for although, for some purposes, the essoign day was treated as the commencement of the term; yet, for other purposes, it was not. For instance, when the statute directed that common bail might be filed for the defendant by the plaintiff of the term in which the writ was returnable, it had been held that bail might be filed between the essoign day and the first day in full term, of the term next after the return of the writ, (*Prigmore v. Bradley*). Again, in moving to enter up judgment on an old warrant of attorney, the affidavit must state the party to have been alive on or after the first day in full term, *Eyles v. Warren* (b); and to state that he was alive on the essoign day was insufficient. Further, in proceedings by bill, as this was, the judgment has relation to the first day in full term (c), although in proceedings [by original it has relation to the essoign day. *Whittaker v. Whittaker* (d). Now, if this be so, it would follow, that unless the practice now complained of be sanctioned, no judgment could be signed at all in proceedings

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PRICE
v.
HUGHES.

(a) 6 East, 314.

(b) 4 M. & S. 174.

(c) 1 Tidd, 935.

(d) 8 B. & C. 768.

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by bill during the interval between the essoign day and the first day in full term; for it would be absurd to sign the judgment on the essoign day, and say it should have prospective relation to the day in full term then to come.

Kelly, contra, contended, that although the constant practice might have been in favour of the course pursued by the plaintiff, yet if the Court found that it was unsupported by sound principle, it would not recognise such a practice. Although judgments might be entered up on warrants of attorney after the death of a party during the vacation after his death, that vacation meant the vacation before the essoign day of the following term. The judgment in the present case, having been signed after that essoign day, was irregular. He cited the judgment of Chief Justice *Holt* in the case of *Odes* or *Oades* v. *Woodward*(a), and in which he said: "First, by the course of the Court, a warrant of attorney to confess a judgment is not revocable, and the Court will give leave to enter up the judgment, though the party does revoke it; but it is determinable by the party's death; but if the party dies in the vacation, the attorney may enter up the judgment that vacation as of the precedent term; and it is a judgment at the common law as of the precedent term, though it be not so upon the statute of frauds, in respect to purchasers, but from the signing; so that this judgment being a judgment at common law as of *Hilary* Term, it was a judgment entered up when the party was alive, and therefore good without all question, if the roll had been brought in before the essoign day of *Easter* Term; but that not being done, the question will be, whether we can now admit it to be filed? By the course of the Court, all the rolls of *Hilary* Term ought to be brought in before the essoign day of *Easter* Term, and made part of the bundle of *Hilary* Term; and it is for this reason that what is done in the va-

(a) 1 Salk. 87; S. C. 2 Lord Raym. 766.

cation is looked upon as an act of the term preceding; and there cannot be a *post terminum* roll received without leave upon motion, which the Court does not grant but when it appears that no body can be prejudiced, for it is dangerous; and he said that practice should never have his consent to be allowed again; for, by this means the statute of frauds and the act for docketting of judgments will be frustrated; for if the Court allow the filing of this roll in *Easter Term* as a judgment of *Hilary*, when it was not among the rolls of that term, how shall purchasers avoid the consequence of it, when it was neither docketted nor brought in? Upon this account the Court disallowed the filing." From this judgment it must be clear that the three days before the first day in full term, including the essoign day, must be considered as part of the term.

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PATTESON, J.—Formerly, a Judge used to come down to Court, and sit on the essoign day. But, since the passing of the 11 *Geo. 4* & 1 *Will. 4*, c. 70, s. 6, I apprehend a Judge could not come down to Court now, and sit on the essoign day.

Kelly.—That act, by fixing the days on which the terms are to commence, has not altered the practice with respect to the essoign day, in such cases as the present. He submitted, that, on the ground of the judgment thus signed not being according to the true practice of the Court, and of the frustration of the statute of frauds which might be the consequence of adopting such a practice, the present rule ought to be made absolute.

Robinson.—As to the case of *Oades v. Woodward*, cited on the other side, it differed from a further report of that case in 3 *Salk*. 116; as there the judgment had not been docketted; and, moreover, it was at that time considered necessary that the rolls of one term should be carried in

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before the commencement of the next. But it was now decided that the rule of Court on this subject was only *directory*. *Barron v. Cross* (a).

PATTESON, J.—I think, upon the last act of Parliament, 11 *Geo. 4* & 1 *Will. 4*, c. 70, s. 6, no doubt can arise in the present case. That statute directed, that each term should commence on a particular day, and that the first general return day should be on the fourth day before the first day in full term. With this provision the 1 *Will. 4*, c. 3, s. 2, did not substantially interfere. Those three days previous to the first day in full term cannot be considered as part of the term. In the case of *Doe v. Roe* (b), which was an application under 11 *Geo. 4* & 1 *Will. 4*, c. 70, s. 36, by which certain facilities are given to landlords for the recovery of their premises, where their right of possession accrues during *Hilary* or *Trinity* Term, and the landlord's title had accrued between the *essoign* day and the first day in full term of *Trinity* Term, the Court held, that as the sixth section of the same act had directed that *Trinity* Term should commence on a particular day, and the landlord's title having accrued before that day, the title did not accrue during *Trinity* Term. Then, if those three days are not part of the term, they must be a part of the preceding vacation. This judgment, therefore, must be considered as entered up of the preceding term. It seems to me, that the 11 *Geo. 4* & 1 *Will. 4*, c. 70, s. 6 has done away with the *essoign* day for all purposes as part of the term; and therefore it never can be considered as part of the term, except where a writ has been made returnable on any of those three days, in which case a question might arise whether or not the same consequences would result, as if it had been made returnable on the first day of the term. Then, with respect to the statute of frauds, although Lord *Holt* made those observations in his judgment in the case in

(a) 4 B. & C. 388; 6 D. & R. and Others, 5 D. & R. 350.
386, S. C. See *Inwood v. Mawley* (b) *Ante*, p. 179.

Salkeld, no such consequence as he seemed to anticipate could result. By not signing judgment till after the essoign day of the subsequent term, no injury could result to purchasers. For although the judgment so signed as between the parties has relation back to the first day of the previous term, yet, as against purchasers, it only operates from the time of signing. It could, therefore, make no difference to purchasers, whether the judgment was signed before or after the commencement of the term. The present rule must therefore be discharged, but without costs.

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Rule discharged, without costs.

IVEMY v. FARRANT.

June 13th.

IN an action of *assumpsit*, on a guarantie, the defendant pleaded *not guilty*. The plaintiff treated the plea as a nullity, and signed judgment. An application was made to set the judgment aside; and on cause being shewn—

The plea of "not guilty," in an action of *assumpsit*, cannot be treated as a nullity.

PATTESON, J., said, the case of *Davison v. Moreton* (a) is directly in point. There it was held, that the plea of *not guilty*, to an action of *assumpsit*, cannot be treated as a nullity. The plaintiff might have demurred to it, but he had no right to treat it as a nullity.

Erle shewed cause.

Platt supported the rule.

Rule absolute.

(a) 1 Chit. Rep. 715.

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June 14th.

Where the Sheriff is ruled to bring in the body, he is bound to obey the rule, although the proceedings of the plaintiff may be stayed by an injunction obtained by the defendant. Under 5 *Reg. Gen. H. T. 2 Will. 4*, the plaintiff must declare conditionally if he can, in order to entitle him to have an attachment against the Sheriff to stand as a security.

REX v. The Sheriff of MIDDLESEX.

JEREMY shewed cause against a rule obtained by *Dowling*, for an attachment against the Sheriff, for not bringing in the body. The facts, as set forth in the affidavit, and which were not disputed, were these: In the month of *February*, the defendant in the action was arrested for 359*l.* 15*s.* 6*d.* The writ was returnable on the first day of *Easter Term*, which was the 16th of *April*. On that day, the Sheriff was ruled to return the writ. On the 25th, bail above was put in. On the 26th, the bail were excepted to, and the Sheriff ruled to bring in the body. On the 27th, the defendant gave notice of justification of his bail on *Monday*, the 30th of *April*. On the 30th, the defendant obtained further time to justify till the 3rd *May*, on payment of costs; and the costs were taxed and paid. On the 3rd *May*, time was given to the plaintiff to inquire after the bail, till the 7th *May*. On the 7th, the bail were rejected. On the 16th *May*, the defendant was rendered to the *King's Bench*, in discharge of his bail. On the 17th *April*, the defendant filed a bill in equity for discovery, and for an injunction; and, on the 28th, an order for the common injunction until answer was obtained, and immediate notice given to the plaintiff, as also to the Sheriff. On the 1st *May*, the injunction was sealed and served. On the 24th, the plaintiff obtained an order absolute for dissolving the injunction. The body rule having expired on the 30th of *April*, it was said, that, as the bail was rejected ultimately, the Sheriff had been in contempt ever since that day. But, on the 28th *April*, the injunction had been obtained, and of that the Sheriff was bound to take notice. The authorities clearly shewed that the injunction operated from the time of its being obtained. He cited *Ratray v. Bishop* (a), *Grant's Chan. Prac.* 316, 1 *Turner's Chan. Prac.* 96; and, on these authorities, he insisted, that, as the plaintiff had not declared, the order

(a) 3 Madd. 220.

operated as a stay of all proceedings, and not merely of execution. From the 28th, then, when the injunction was obtained, till the 24th *May*, when it was dissolved, the Sheriff could not proceed; and, when the 24th *May* arrived, the Sheriff had nothing to do, for the defendant had then been rendered. The Sheriff, therefore, was never in any default, and the rule for an attachment against him must be discharged.

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Dowling, contrà.—The effect of the injunction, no doubt, was to restrain the plaintiff's proceedings, for he was mentioned in the injunction. But how could it affect the Sheriff, who was not mentioned in it? Besides, the situations of the plaintiff and the Sheriff were very different. The plaintiff was a party in a cause, and must, of course, be bound by the steps taken against him in it. But the Sheriff was an officer of the Court, who had, in fact, nothing to do with the cause, but was merely bound to obey the commands of the Court. He had been commanded to have the body in Court on the 30th *April*, and he was bound to watch the Court, and see that the body, or bail in its stead, was there. If he had any fear of incurring a contempt of the Court of equity, by thus proceeding, he ought to have come to the Court, and applied for time to perform the exigency of the rule. This he had not done; and therefore, the bail having ultimately been rejected, he had been in contempt ever since the 30th *April*.

PATTESON, J.—There is no case which shews how far the proceedings in a cause, as far as the Sheriff is concerned, are affected by an injunction. It appears that the Sheriff should have put in bail on the 30th *April*, and it does not appear that he was prevented from proceeding. The plaintiff has, therefore, a right to move for an attachment against him. But, as the defendant is rendered, and therefore the attachment would be set aside on payment of costs, there is no use in the attachment going.

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Dowling submitted, that the attachment ought to stand as a security. It was true, that under R. 5, H. T. 2 *Will.* 4(a), the attachment was not to stand as a security, unless the plaintiff had declared *de bene esse*. But, in this case, the plaintiff's proceedings had been stayed by an injunction obtained by the defendant, and the Sheriff had thought proper to avail himself of a supposed restraint upon him not to do his duty, by having the body or bail in Court at the expiration of the body rule. This entitled the plaintiff to have the present case made an exception out of the general rule of *Hilary* Term.

PATTESON, J.—The plaintiff might have declared *de bene esse* if he had thought proper, and then he would have been entitled to have the attachment stand as a security. As he has not done so, he is not so entitled. The present rule will, therefore, be discharged, the Sheriff paying the costs of it.

Rule discharged, with costs to be paid by the Sheriff.

(a) *Ante*, p. 199.

June 14th.

What is a sufficient service in ejectment.

DOE d. OSBALDISTON v. ROE.

DODD moved for judgment against the casual ejector. The affidavit stated, that inquiry had been made for *Cook*, one of the tenants on the premises, and it was found, that he and his wife and children had left the premises, as it was understood, to embark for *America*; that the wife and children had actually embarked, and it was believed that *Cook* had wholly quitted the premises, and did not intend to return. The declaration had been affixed on the door of *Cook's* house, on the premises, and had also been delivered and read over and explained to a person on the

premises, who was servant to one of the tenants of other part of the premises. The affidavit did not state that *Cook* had left the premises to avoid being served with the declaration.

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PATTESON, J.—You may take a rule to shew cause, and serve it in the same manner as the declaration was served.

Rule granted.

WRIGHT, Assignee of JOHNSON, *v.* HUNT.

June 14th.

ADDISON objected to the reception of affidavits produced by *V. Richards*, on shewing cause against a rule, on the ground that they were wrong intituled. They were intituled merely "*Wright v. Hunt*," instead of "*Wright, Assignee of Johnson, v. Hunt*."

Affidavits intituled in a cause, without giving the plaintiff the addition of "assignee," cannot be used in a cause where the plaintiff sues as assignee.

V. Richards submitted, that the addition of "assignee" was mere description.

PATTESON, J.—No, it is not description in this case (a).

Rule absolute.

(a) See — Executors, *v.* —, ante, p. 97.

BRETHERTON *v.* OSBORNE.

June 15th.

DODD moved for a rule to shew cause, why the plea of the plaintiff's bankruptcy, which had been pleaded *puis*

A plea *puis darrein continuance* of the plaintiff's bankruptcy cannot be pleaded

till the execution of the assignment to the assignees; and where the assignment was executed on the day of the last continuance in *banc*, and the defendant did not plead the plea till the Assizes, the Court refused to set it aside, as it did not appear that the assignment was executed sufficiently early to allow the defendant to plead it on the last continuance day.

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darrein continuance, at the last Assizes, should not be set aside, and why the defendant should not pay to the plaintiff the costs of going down to trial at the Assizes. The action was brought for negligence as a bailee, in not taking care of coaches and other property delivered to be kept. The general issue was pleaded. Notice of trial was given on the 6th *February*, 1832, for the next Assizes; and, at the Assizes, the defendant pleaded that the plaintiff became bankrupt after the last continuance. The plea was bad, since the matter in fact arose before the last continuance, and might have been pleaded in *banc*, which would have saved the plaintiff the heavy expense of going down to trial. The last continuance before the Assizes was the 31st *January*, the last day of *Hilary* Term, and the return day of the *venire facias*. The commission of bankrupt issued on the 31st *December*, 1831. The plaintiff was adjudged a bankrupt on the 3rd *January* following, and the assignment to the assignees was on the 31st *January*, the same day as the last continuance. It might be doubtful, whether the plea could have been pleaded before the assignment, but it might have been pleaded on that day, or the defendant, by applying to a Judge after term, might have been allowed to plead it *nunc pro tunc*, instead of letting the plaintiff go to trial, and giving him no notice of any other plea than the general issue.

LITLEDALE, J.—It is quite clear, the plea could not have been pleaded before the assignment, as the cause of action was not divested out of the bankrupt till the assignment was executed; and then it did not appear at what time on the 31st *January* the assignment was executed. It might have been executed so late that the plea could not possibly have been pleaded on that day.

Rule refused.

JOHNSON *v.* TWEED.

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June 15th.

F. POLLOCK moved to set aside an annuity deed, on the ground of a defect in the memorial. The consideration stated in the memorial was 1500*l.* paid to the grantor. In addition to this, there was a covenant to insure the life of the grantor for the benefit of the grantee: no notice was taken of this covenant in the memorial.

In the memorial of an annuity deed, it is not necessary to state a covenant by the grantor to insure his life for the benefit of the grantee; for that is a collateral matter.

PATTESON, J.—It seems to me that that is a collateral matter, which is not necessary to be put into the memorial.

Rule refused.

BRAY *v.* YATES.

June 15th.

CROWDER applied for an attachment, absolute in the first instance, for non-payment of costs, pursuant to the Master's *allocatur*. There had been a change of attornies and a Judge's order made for payment of such costs as should be found due on taxation. The Master had allowed certain costs, which had not been paid.

The rule for an attachment for non-payment of costs, between attorney and client, pursuant to the Master's *allocatur*, is *nisi* in the first instance.

LITTLEDALE, J., (having referred to the clerk of the rules).—You may take your rule, but it must be *nisi* in the first instance. It is different from an attachment for non-payment of costs in a cause. The costs between attorney and client are in the nature of an account, and therefore the client ought to have an opportunity of being heard against the rule.

Rule *nisi* granted.

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June 16th.

HOBART v. WILKINS.

In an action for a libel, where the venue is laid in one county, and removed, on the common affidavit, into another, the Court will move it back on an affidavit stating that the newspaper in which the libel appeared is published as much in one county as the other.

STARKIE shewed cause against a rule for changing the venue back from *Lancashire* into *Cumberland*. The action was for a libel, published in a *Cumberland* paper. The venue had originally been laid in *Cumberland*, and had been changed to *Lancashire*, upon the common affidavit. The motion to change it back was founded on an affidavit, stating that the paper was published as much in one county as the other.

Wightman supported the rule.

PATTESON, J.—The plaintiff is entitled to have the venue changed back on that affidavit.

Rule absolute (a).

(a) See 1 Tid. Prac. 605, ed. 9, and cases there cited.

June 16th.

DAY v. SMITH.

When the whole interest of a party in an award is assigned to another, the Court will not compel the latter to give security for costs in an action brought by the former upon the award.

BLACKBURN shewed cause against a rule requiring a person named *Anderson* to give security for costs, on the ground that he was abroad. The facts were these. A person named *Day*, the present plaintiff, had become interested in an award, and all his interest in it he assigned to *Anderson*. The present action was brought on that award, in the name of *Day*; and this application was made to compel *Anderson*, who was abroad, to give security for costs, on the ground that the plaintiff was a poor man. There was no pretence for this application, for the Courts had, in much stronger cases than the present, refused to interfere, by compelling the plaintiff to give security for costs. In the case of *M'Connell* and

Varlett v. Johnston (a), and in an *Anonymous* case in *Taunton's Reports* (b), where there were two plaintiffs, and one of them was abroad, the Court refused to compel him to give security for costs.

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Follett, in support of the rule, contended that the present application was not made on the ground of the plaintiff's poverty, but on the ground that the action was brought, not for the benefit of the nominal plaintiff, but for the benefit of another person, *vis. Anderson*. The Court had frequently interfered in this way in the case of actions brought by assignees of bankrupts or insolvent debtors. There the security for costs was enforced against the assignees. So also, where property has been assigned by a debtor for the benefit of his creditors, the trustees have been compelled to find security for costs, because they were the persons really interested.

PATTESON, J.—That is where a party has been deprived of all his property; and therefore the Court forces those parties who are become possessed of it to give security. But there is no instance in which, an individual's property having been assigned, the Courts have made the assignee find security for costs. It is as well not to extend the practice; this rule must be discharged, with costs.

Rule discharged, with costs (c).

(a) 1 East, 431.

(b) 7 Taunt. 307.

(c) See *Morgan v. Evans* and Others, where the Court refused to require the plaintiff to give security for costs, although it was

sworn that he was insolvent, and that the action was brought in his name for the benefit of *I. S.* who was alone beneficially interested in the result. 7 J. B. Moore, 344.

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June 16th.

JONES and BLAND v. HUNTER and WARD.

A warrant of attorney given by a client to his attorney to secure future costs, is illegal.

COMYN shewed cause against a rule for setting aside all proceedings on a judgment signed on a warrant of attorney given by the defendants to the plaintiffs; and why the several bills of costs, included in the amount secured by the said warrant of attorney, should not be referred to the Master for taxation. It appeared that the plaintiffs were employed as attorneys to the defendants, and that the warrant of attorney had been given by the latter to secure the amount of bills of costs which should become due to them. It was submitted, that, as the warrant of attorney had not been given to secure any certain amount, and as the bills had been regularly delivered, and the charges were regular, there was no ground for setting aside these proceedings.

White, contra, contended that an attorney had no right to take a warrant of attorney to secure the payment of costs to be incurred. He cited the case of *Jones v. Tripp* (a). There Lord *Eldon* said, "the Court would not permit an attorney to take from his client a mortgage for costs to be incurred." He also cited *Watt v. Grove* (b), *Harris v. Tremeneere* (c), *Montesquieu v. Sandys* (d), *Bellew v. Russel* (e), *Walmesley v. Booth* (f), *Newman v. Payne* (g), *Balne v. Paver* (h), *Scougall v. Campbell* (i), and *Drax v. Scroupe* (k).

(a) Jac. Rep. 322.

(b) 2 Sch. & Lef. 503.

(c) 15 Ves. 40, 41.

(d) 18 Ves. 308, 318.

(e) 1 Ball & Bea. 105. See also 1 Hovenden on Frauds, 28, 29.

(f) 2 Atk. 27.

(g) 4 Bro. C. C. 350, 2 Ves. Jun. 199.

(h) Jac. Rep. 305.

(i) 3 Russ. 545.

(k) *Ante*, p. 69.

PATTESON, J.—A warrant of attorney given by a client for the payment of future costs, is clearly bad, even without the decision of Lord *Eldon*. The matter must go to the Master to ascertain the amount of the bills, and to tax them. If any of them have been *bonâ fide* settled and paid, he will not tax them.

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Rule absolute.

MACKEY v. GOODDEN and Others.

June 16th.

FOLLETT on a former day had obtained a rule, calling upon the plaintiff to shew cause why he should not pay to the defendants double costs, under the following circumstances. By a local act of the 45th of *Geo. 3*, c. lxxvii. a Court of Requests was established for the city of *Bath* and places adjacent, and certain persons were appointed commissioners of the Court. By section 46, it was provided, that, if any person should wilfully insult or abuse any of the Commissioners during the sitting of the Court, the serjeant of the Court, by the order of the Commissioners, might take the offender into custody; and then the Commissioners, upon examination of the offender, might impose a fine, to be levied by distress, and, for want of a sufficient distress, the offender was to be committed to the common gaol, or house of correction, for a period not exceeding one month. The action, out of which the present motion sprung, was an action of trespass brought against one of the Commissioners, and two officers of the Court, for pushing the plaintiff out of the Court into the street. The defendants pleaded the general issue, and several special pleas, stating, in substance, that the plaintiff was turned out of the Court because he "abused the Commissioners in the performance of their duty, and refused to desist when requested so to do." The plaintiff took issue upon all the pleas, and new assigned as to all

Commissioners of a Court of Requests, who have power to commit for contempt, are not within the 42 *Geo. 3*, c. 85, s. 6, which extends the 21 *Jac. 1*, (giving double costs) to all persons empowered to commit to safe custody: and therefore, where trespass for false imprisonment is brought against them for an act done in the execution of their office, and the plaintiff is nonsuited, they are not entitled to double costs.

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the special pleas, upon which there was a demurrer for duplicity, which came on to be argued, when the Court gave judgment for the defendants on the demurrer, with leave for the plaintiff to amend. The plaintiff, however, did not amend, and, ultimately, the defendants obtained judgment as in case of a nonsuit, on account of the plaintiff not having proceeded to trial on the general issue. The motion for double costs was grounded on the 42 *Geo.* 3, c. 85, which was intituled, "An Act for the trying and punishing, in *Great Britain*, persons holding public employments, for offences committed abroad, and for extending the provisions of an act, passed in the 21st year of the reign of King *James*, made for the ease of justices and others in pleading in suits brought against them, to all persons, either in or out of this kingdom, *authorized to commit to safe custody*." And by section 6, reciting that it was expedient to extend the provisions of the act of 21 Jac. 1, intituled, "An Act to enlarge and make perpetual the act made for ease in pleading against troublesome and contentious suits prosecuted against justices of the peace, mayors, constables, and certain other his Majesty's officers, for the lawful execution of their office, made in the 7th year of his Majesty's most happy reign, to all persons who may, by law, commit to safe custody either in or out of this kingdom, it was enacted, that, from and after the passing of that act, the said recited act, and all the provisions therein contained, should extend to all persons *having, holding, or exercising, or being employed in*, or who might hereafter have, hold, or exercise, or be employed in any public employment, or any *office, station, or capacity*, either civil or military, either in or out of this kingdom, and who, under and by virtue or *in pursuance of any act* of Parliament, or law, or lawful authority, within this kingdom, or any act &c. or lawful authority in any plantation, island, colony, or foreign possession of his Majesty, *have, or may hereafter have, by virtue of any such public employment, or such office, station,*

or capacity, power or authority to commit persons to safe custody; and all such persons, having such power or authority as aforesaid, shall have and be entitled to all the privileges, benefits, and advantages given by the provisions of the said act, as fully and effectually to all intents and purposes as if they had been specially named therein." The 21 Jac. 1, c. 12, s. 5 above referred to gives double costs to the justices, &c. defendants in any action, sued for any thing done by them by reason of their office, in all cases where the plaintiff has become nonsuited, or suffered a discontinuance. It was suggested by *Follett*, that the defendants in the present action were persons authorized to commit within the meaning of the 42 Geo. 3, c. 85: and he also referred to the case of *Blanchard v. Bramble* (a), in which it was held, that, where the defendant obtained judgment as in case of a nonsuit, the defendant was equally entitled to double costs as if the plaintiff had been nonsuited on the trial, and, upon an affidavit disclosing these facts, and shewing that the action was for an act done by the defendants in the execution of their office, the Court granted the rule.

S. Hughes shewed cause; and, after observing that the defendants did not come within any of the acts which give double costs to justices of the peace and constables and persons acting in their aid and assistance, he contended—*first*, That the 42 Geo. 3, c. 85, did not apply to the present case; and, *secondly*, that the local act of 45 Geo. 3, had made an express provision respecting costs. Upon the first point he submitted, that, though the local act of 45 Geo. 3, gave power to the commissioners to commit to prison, under certain circumstances, they were not such persons as were intended by that act under the designation of persons having power to *commit to safe custody*; that that was a peculiar expression, and did not

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(a) 3 Mau. & Selw. 131.

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apply to the defendants, who committed to prison, not for the purpose of safe custody, but by way of punishment: at all events, he contended, that two of the defendants, who were merely officers of the Court, were not protected, inasmuch as they had no power of themselves to commit to custody; and that, he argued, was another reason or presuming that that act was not intended to apply to this case, as the mere officers of the Court, who were most in want of protection, were not mentioned in the act, whereas the 21 Jac. 1, c. 12, and the other acts, for the protection of justices of the peace and constables, expressly include all persons who act in their aid and by their command. Upon the second point, he quoted the 56th sect. of the local act (45 Geo. 3, c. lxvii), which established the Court, and which, after directing that such actions should be commenced within three calendar months, and after forty-two days' notice, enacted, that, if the plaintiff should be nonsuited or discontinue his action, or if upon demurrer judgment should be given against the plaintiff, the defendant shall *recover costs, and have such remedy for recovering the same as any defendant hath for costs of suit in other cases by law*. He contended that the costs here mentioned meant common costs, and that, if double costs had been intended, they would have been mentioned, especially as this act was passed three years after the 42 Geo. 3.

PATTESON, J. (after hearing *Follett* in reply).—It seems to me that the 42 Geo. 3 was not intended to apply to the present case. It is remarkable that the act does not speak of persons acting in aid and assistance: and it has been admitted that so far the act does not apply, as two of the defendants were mere officers of the Court. As to the other defendant, I think he is not a person authorized to commit to safe custody within the meaning of that act. And when I look at the local act, I find, that, though it specifies time, it does not mention double costs. Upon

the whole, it appears to me that these defendants do not come within the 42 Geo. 3; and the rule must, therefore, be—

Discharged.

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RUDDOCK v. SMITH and Others.

(Before the Four Judges.)

June 16th.

THIS was an action of trespass. Pleas to the whole declaration—first, not guilty; secondly, a justification. Replication—issue on the plea of not guilty; and traverse of the special plea. A new assignment of excess. The defendant joined issue on the traverse, withdrew his plea of not guilty, and suffered judgment by default upon the new assignment. The *venire* was as well to try the issues joined as to assess the damages on the judgment by default. Notice of trial was given and the record entered; after which the plaintiff entered a *nolle prosequi* as to the whole of his declaration so covered by the special plea, and executed a writ of inquiry for the excess stated in his new assignment. The Master only allowed the plaintiff the costs of a common inquiry.

In trespass, the defendant pleaded, first not guilty, and secondly, justification. Issue on the first plea; traverse to the second, and new assignment for excess. Issue joined on the traverse, plea of not guilty withdrawn, &c., judgment by default on the new assignment. *Nol. pro.* as to the issue on the second plea, and a writ of inquiry executed on the judgment by default:—*Held*, that the plaintiff was only entitled to the costs of executing a writ of inquiry.

Platt moved that the Master might review his taxation, and contended, that, according to the rules of pleading, the plaintiff was entitled to all the costs previous to the new assignment.

Kelly, who appeared to shew cause in the first instance, was stopped by the Court.

Per Curiam.—The general issue was in this case withdrawn by the defendant, and the plaintiff having entered a *nolle prosequi* as to his declaration covered by the special plea, and the defendant having suffered judgment by default as to the new assignment, the only question upon

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the record which was to be tried between the parties was the amount of damages to which the plaintiff was entitled on the execution of the writ of inquiry. There is, therefore, no pretence for making the defendant pay more than the amount of costs incurred on the execution of a writ of inquiry.

Rule refused (a).

(a) See *Broadbent v. Shaw and Others*, 2 B. & Adol. 940, and *ante*, p. 336, and *Forester v. Dale*, *ante*, p. 412.

June 16th.

In re PATERSON, Gent., one, &c.

Where an attorney of one Court gives his undertaking as an attorney for a debt and costs in an action in another, the Court of which he is an attorney will compel him to fulfil his undertaking, though void by the statute of frauds.

BUTT obtained a rule, calling on *Paterson*, an attorney of this Court, to shew cause why he should not pay to the plaintiff in an action in the Court of *Exchequer* the amount of the debt and costs pursuant to his undertaking. The motion was founded on an affidavit which stated that *Paterson* was an attorney of the *King's Bench*, but not an attorney of the Court of *Exchequer*; that he had conducted the proceedings for the defendant in an action in the latter Court; and that, whilst so conducting the business, he had induced the plaintiff to stay proceedings, on his undertaking to pay the debt and costs; and that he had refused to pay the amount. It was doubtful whether the undertaking disclosed a sufficient consideration on its face for supporting an action; and, therefore, as the plaintiff could not go to the Court of *Exchequer*, his only safe course was to apply to this Court.

PATTERSON, J.—Is there any authority for the motion?

Butt cited the case of *In re Greaves*, Gent. (a), which was an action commenced in the *Common Pleas*, and judgment obtained. The facts of the case were—*Greaves*,

(a) 1 Crompt. & Jerv. 374, n.

an attorney of the Court of *King's Bench*, but not an attorney of the Court of *Common Pleas*, who was attorney for the defendant, proposed to compromise the action, and agreed verbally to give his two promissory notes for the debt and costs, payable at six and nine months, in consideration of the plaintiff's staying proceedings. This was accepted by the plaintiff, but *Greaves* afterwards declined to give the bills; whereupon a rule was obtained, calling upon *Greaves* to pay the debt and costs. *Per Curiam*.—"Even supposing the undertaking to be void by the statute of frauds, this Court may, nevertheless, exercise a summary jurisdiction over one of its own officers, an attorney of the Court. The undertaking was given by the party in his character of attorney, and in that character the Court may compel him to perform it. An attorney is conusant of the law; and if he gives an undertaking which he must know to be void, he shall not be allowed to take advantage of his own wrong, and say that the undertaking cannot be enforced." The rule was made absolute. The party to pay the amount of the first note and the costs of the application within ten days; and the amount of the second note within nine months from the time of the agreement.

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PATTERSON, J.—That is a direct authority. Take a rule.

On a subsequent day *Steer* appeared for *Paterson*, and consented that the rule should be made absolute.

Rule absolute (a).

(a) See *Walker v. Arlett*, ante, p. 61; and *Bursell v. Jones*, 3 B. & Ald. 47.

END OF TRINITY TERM.

REGULÆ GENERALES.

AGREED UPON BY THE JUDGES IN PURSUANCE OF THE STAT.
2 Will. 4, c. 39 (a).

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I.

IT IS ORDERED, That every writ of summons, *capias*, and detainer, shall contain the names of all the defendants, (if more than one), in the action, and shall not contain the name or names of any defendant or defendants in more actions than one.

2. IT IS FURTHER ORDERED, That the following fees shall be taken—

For signing all writs for compelling an appearance, whether of summons, *distringas*, *capias*, or detainer, whether the same shall be the first writ or an *alias* or *pluries* writ, and whether the same shall issue into the same county as the preceding writ, or into a different county. 0 2 6

(a) These rules, promulgated on the first day of *Michaelmas* Term, were made under the authority of the 2 Will. 4, c. 39, s. 14, the words of which are: "And be it further enacted, that it shall and may be lawful to and for the Judges of the said Courts, and they are required, from time to time to make all such general rules and orders for the effectual execution of this act

and of the intention and object hereof, and for fixing the costs to be allowed for and in respect of the matters herein contained, and the performance thereof, as in their judgment shall be deemed necessary or proper; and for that purpose to meet as soon as conveniently may be after the passing hereof." See 3 Dowl. Stat. p. 155.

For sealing the same.	0	0	7	1832.
For entering an appearance for every defendant.	0	1	0	REG. GEN.
Unless an appearance shall be entered for more than one defendant by the same attorney, and in that case for every additional defendant.	0	0	4	

3. IT IS FURTHER ORDERED, That the person serving a writ of summons shall, within three days at least after such service, indorse on such writ the day of the week and month of such service, otherwise the plaintiff shall not be at liberty to enter an appearance for the defendant according to the statute; and every affidavit upon which such an appearance shall be entered shall mention the day on which such indorsement was made (a).

4. IT IS FURTHER ORDERED, That the Sheriff or other officer or person to whom any writ of *capias* shall be directed, or who shall have the execution and return thereof, shall, within six days at the least after the execution thereof, whether by service or arrest, indorse on such writ the true day of the execution thereof, and, in default thereof, shall be liable in a summary way to make such compensation for any damage which may result from his neglect, as the Court or a Judge shall direct (b).

5. IT IS FURTHER ORDERED, That R. 2 of H. T. 1832 shall be applicable to all writs of summons, *distringas*, *capias*, and detainer, issued under the authority of the said act, and to the copy of every such writ (c).

6. IT IS FURTHER ORDERED, That any *alias* or *pluries* writ of summons may, if the plaintiff shall think it desirable, be

- (a) See 2 Will. 4, c. 39, s. 1, and 3 Dowl. Stat. 148, note (e).
towards the end; and 3 Dowl. Stat 138, note (b).
(b) See 2 Will. 4, c. 39, s. 4;
(c) See *ante*, p. 198; and *Ryley v. Boissomas*, *ante*, p. 383; and *Lewellin v. Norton*, *ante*, p. 416.

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issued into another county, and any *alias* or *pluries* writ of *capias* may be directed to the Sheriff of any other county; the plaintiff in such case upon the *alias* or *pluries* writ of summons describing the defendant as late of the place of which he was described in the first writ of summons, and upon the *alias* or *pluries* writ of *capias* referring to the preceding writ or writs as directed to the Sheriff to whom they were in fact directed (*a*).

7. IT IS FURTHER ORDERED, That the *alias* or *pluries* writ of summons into another county shall be in the following form—

William the Fourth &c.

To C. D., of —, in the county of —, late of —,
 in the county of —.

[*Original County.*] WE command you, as before [or often] we have commanded you &c. [*as in the writ of summons No. 1 in the schedule of the said act.*]

And that the *alias* and *pluries* writ of *capias* shall be in the following form—

William the Fourth &c.

To the Sheriff of —

WE command you, as heretofore we have commanded the Sheriff of —, that you omit not &c. [*as in the writ of capias No. 4, in the schedule of the said act.*]

8. IT IS FURTHER ORDERED, That in every writ of *distingas* issued under the authority of the said act, a *non omitas* clause may be introduced by the plaintiff without the payment of any additional fee on that account (*b*).

(*a*) See s. 10 of the above act,
 and 3 Dowl. Stat. 151, note (*k*).

(*b*) See s. 3 of the above act,
 and 3 Dowl. Stat. 146, note (*d*).

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9. IT IS FURTHER ORDERED, That when the attorney actually suing out any writ shall sue out the same as agent for an attorney in the country, the name and place of abode of such attorney in the country shall also be indorsed upon the said writ (a).

10. IT IS FURTHER ORDERED, That if the plaintiff or his attorney shall omit to insert in or indorse on any writ or copy thereof any of the matters required by the said act to be by him inserted therein or indorsed thereon, such writ or copy thereof shall not on that account be held void, but may be set aside as irregular upon application to be made to the Court out which the same shall issue, or to any Judge.

11. IT IS FURTHER ORDERED, That upon all writs of *capias*, where the defendant shall not be in actual custody, the plaintiff at the expiration of eight days after the execution of the writ, inclusive of the day of such execution, shall be at liberty to declare *de bene esse* in case special bail shall not have been perfected. And if there be several defendants, and one or more of them shall have been served only and not arrested and the defendant or defendants so served shall not have entered a common appearance, the plaintiff shall be at liberty to enter a common appearance for him or them and declare against him or them in chief, and *de bene esse* against the defendant or defendants who shall have been arrested and shall not have perfected special bail (b).

12. IT IS FURTHER ORDERED, That in case the time for

(a) See s. 12 of the above act, and 3 Dowl. Stat. 153, note (m).

(b) By 10 Reg. Gen. T. T. 1 Will. 4, ante, p. 104; no declara-

tion *de bene esse* can be delivered until the expiration of six days from the time of the service or arrest.

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pleading to any declaration, or for answering any pleadings, shall not have expired before the 10th day of *August* in any year, the party called upon to plead, reply, &c., shall have the same number of days for that purpose after the 24th day of *October* as if the declaration or preceding pleading had been delivered or filed on the 24th of *October*, but in such cases it shall not be necessary to have a second rule to plead, reply, &c. (a)

13. IT IS FURTHER ORDERED, That in case a Judge shall have made an order in the vacation for the return of any writ issued by authority of the said act, or any writ of *ca. sa.*, *fi. fa.*, or *elegit* on any day in the vacation, and such order shall have been duly served, but obedience shall not have been paid thereto, and the same shall have been made a rule of Court in the term then next following, it shall not be necessary to serve such rule of Court, or make any fresh demand of performance thereon; but an attachment shall issue forthwith for disobedience of such order, whether the thing required by such order shall or shall not have been done in the mean time (b).

14. IT IS FURTHER ORDERED, That if any attorney shall, as required by the said act, declare that any writ of summons or writ of *capias*, upon which his name is indorsed, was not issued by him or with his authority or privity, all proceedings upon the same shall be stayed until further order (c).

15. IT IS FURTHER ORDERED, That every declaration shall in future be intituled in the proper Court, and of the day

(a) See the last proviso of s. 11 of the above act, and 3 Dowl. Stat. 152, note (l).

(b) See s. 15 of the above act, and 3 Dowl. Stat. 154, note (n).

(c) See s. 17.

of the month and year on which it is filed or delivered, and shall commence as follows—

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Declaration after Summons.

[*Venue.*] *A. B.* by *E. F.* his attorney [*or*, in his own proper person] complains of *C. D.*, who has been summoned to answer the said *A. B.* &c.

Declaration after Arrest where the Party is not in Custody.

[*Venue.*] *A. B.* by *E. F.* his attorney, [*or*, in his own proper person] complains of *C. D.* who has been arrested at the suit of the said *A. B.* &c.

Declaration where the Party is in Custody.

[*Venue.*] *A. B.* by *E. F.* his attorney [*or*, in his own proper person] complains of *C. D.* being detained at the suit of the said *A. B.* in the custody of the Sheriff [*or*, the Marshal of the *Marshalsea* of the Court of *K. B.*, or the Warden of the *Fleet*.]

Declaration after the Arrest of one or more Defendant or Defendants and where one or more other Defendant or Defendants shall have been served only and not arrested.

[*Venue.*] *A. B.* by *E. F.* his attorney [*or*, in his own proper person] complains of *C. D.*, who has been arrested at the suit of the said *A. B.* [*or*, being detained at the suit of the said *A. B.*, *as before*,] and of *G. H.*, who has been served with a writ of *capias* to answer the said *A. B.* &c.

And that the entry of pledges to prosecute at the conclusion of the declaration shall in future be discontinued.

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II.

IT IS ORDERED, That the writ of *capias* and *distringas* which shall hereafter be issued out of the Superior Courts of law at *Westminster* into the counties palatine of *Lancaster* or *Durham* shall be directed to the Chancellor of the county palatine of *Lancaster* or his deputy there, or to the Bishop of *Durham* or his Chancellor there, and shall be in the following form (a)—

Writ of Distringas.

William the Fourth, &c.

To the Chancellor of our county palatine of *Lancaster* or his deputy there [or, “To the Reverend Father in God —, by divine providence, Lord Bishop of *Durham*, or to his Chancellor there,”] greeting—We command you that by our writ under the seal of our said county palatine, to be duly made and directed to the Sheriff of our said county palatine, you command the said Sheriff [or, *if in Durham*, that by our writ under the seal of your bishoprick, to be duly made and directed to the Sheriff of the county of *Durham*, you cause the said Sheriff to be commanded], that he omit not by reason of any liberty in his bailiwick, but that he enter the same, and distrain upon the goods and chattels of *C. D.* for the sum of 40s. in order to compel his appearance in our Court of — to answer *A. B.* in a plea of trespass on the case [or, debt, or *as the case may be*], and how he shall execute that our writ be made known to us in our said Court on the — day of — now next ensuing.

Witness —, at *Westminster*, the — day of —, in the — year of our reign.

(a) See ss. 3, 4; and 3 Dowl. Stat. 145-7 notes (d) and (e).

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Notice to be subscribed to the foregoing Writ.

In the Court of —.

Between *A. B.*, plaintiff, and *C. D.*, defendant.
Mr. *C. D.*

Take notice that I have this day distrained on your goods and chattels in the sum of 40s. in consequence of your not having appeared in the said Court to answer to the said *A. B.* according to the exigency of a writ of summons, bearing *teste* on the — day of —, and that in default of your appearance to the present writ within eight days inclusive after the return hereof, the said *A. B.* will cause an appearance to be entered for you, and proceed thereon to judgment and execution, or [*if the defendant be subject to outlawry*] will cause proceedings to be taken to outlaw you.

Writ of Capias.

William the Fourth &c.

To the Chancellor of our county palatine of *Lancaster*, or his deputy there, [*or, "To the Reverend Father in God —, by divine providence Lord Bishop of Durham, or to his Chancellor there,"*] greeting—We command you that by our writ under the seal of our said county palatine to be duly made and directed to the Sheriff of our said county palatine, you command the said Sheriff [*or, if in Durham, that by our writ under the seal of your bishoprick, to be duly made and directed to the Sheriff of the county of Durham,* you cause the said Sheriff to be commanded that he omit not by reason of any liberty in his bailiwick, but that he enter the same, and take *C. D.*, of —, if he shall be found in his bailiwick, and him safely keep until he shall have given him bail or make deposit with him according to law in an action on promises, [*or, of debt &c.*] at the suit of *A. B.*, or

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until the said *C. D.* shall by other lawful means be discharged from his custody: And that he further command him, that, in execution thereof, he do deliver a copy thereof to the said *C. D.*; and that the said writ do require the said *C. D.* to take notice, that within eight days after execution thereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him in our Court of — to the said action; and that, in default of his so doing, such proceedings may be had and taken as are mentioned in the warning thereunto written or indorsed thereon; and that he further command the said Sheriff, that, immediately after the execution thereof, he do return that writ to our said Court, together with the manner in which he shall have executed the same, and the day of the execution thereof: or that, if the same shall remain unexecuted, then that he do so return the same at the expiration of four calendar months from the date thereof, or sooner if he shall be thereto required by order of the said Court, or by any Judge thereof. Witness —, at *Westminster*, the — day of —.

Memorandum to be subscribed to the Writ.

N. B. This writ is to be executed within four calendar months from the date hereof, including the day of such date, and not afterwards.

Warning to the Defendant.

1. If a defendant, being in custody, shall be detained on this writ, or if a defendant, being arrested thereon, shall go to prison for want of bail, the plaintiff may declare against such defendant before the end of the term next after such detainer or arrest, and proceed thereon to judgment and execution.

2. If a defendant, being arrested on this writ, shall have made a deposit of money according to the stat. 7 & 8 *Geo.*

4, c. 71, and shall omit to enter a common appearance to the action, the plaintiff will be at liberty to enter a common appearance for the defendant, and proceed thereon to judgment and execution.

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3. If a defendant having given bail on the arrest shall omit to put in special bail as required, the plaintiff may proceed against the Sheriff or on the bail bond.

4. If a defendant, having been served only with this writ and not arrested thereon, shall not enter a common appearance within eight days after such service, the plaintiff may enter a common appearance for such defendant, and proceed thereon to judgment and execution.

Indorsements to be made on the Writ of Capias.

Bail for £——, by affidavit.

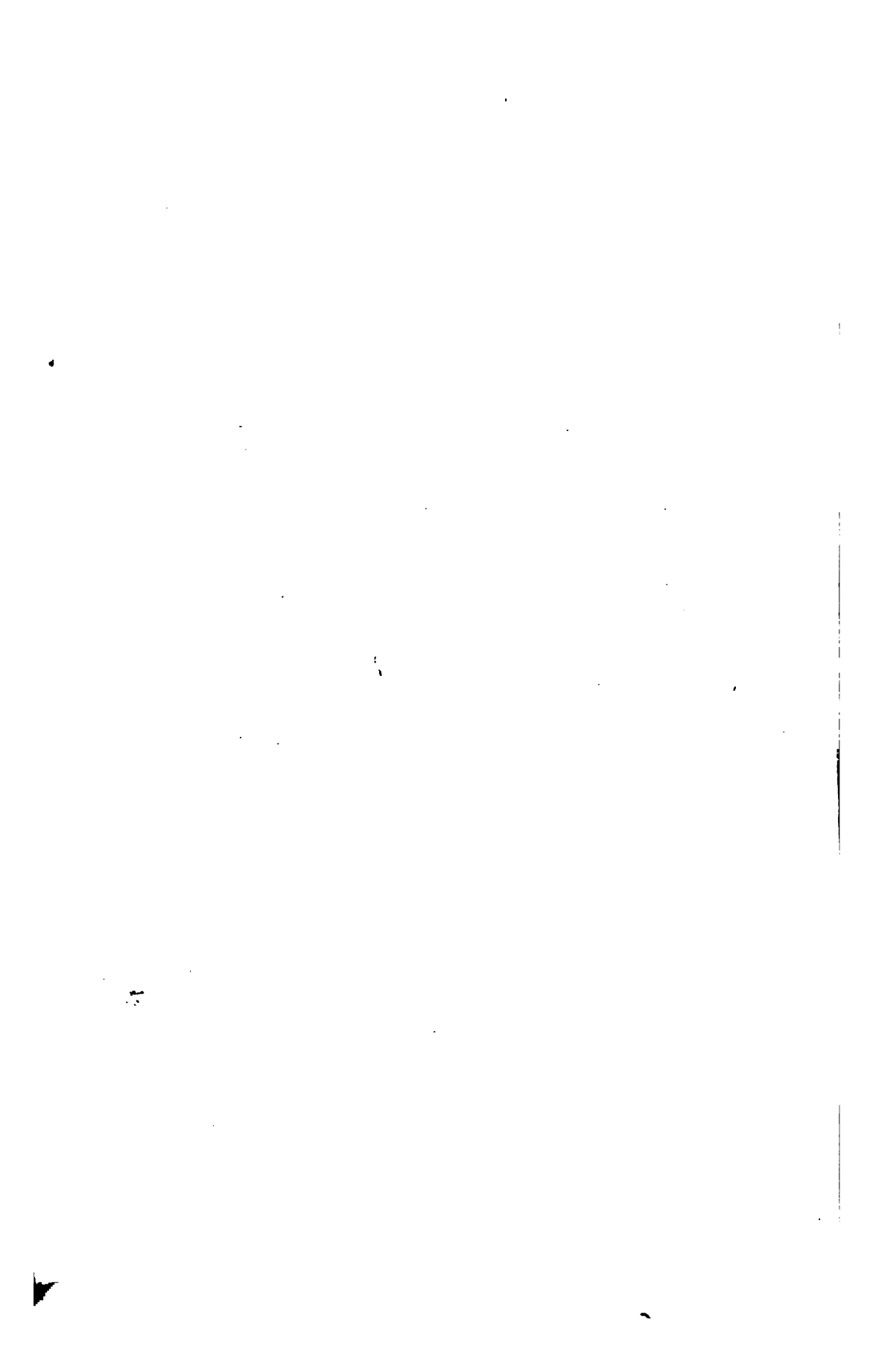
Or,

Bail for £——, by order [*naming the Judge making the order*] dated the —— day of ——.

This writ was issued by *E. F.* of ——, attorney for the plaintiff [*or plaintiffs*] within named.

Or,

This writ was issued in person by the plaintiff within named [*mention the city or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such there be.*]



REPORTS OF CASES

DETERMINED IN

THE PRACTICE COURT

OF THE

Court of King's Bench,

IN MICHAELMAS TERM,

IN THE THIRD YEAR OF THE REIGN OF WILLIAM IV.

REX v. KELSEY (*a*).

COMYN applied for a rule to shew cause why costs, under the 7 *Geo.* 4, c. 64, s. 22, in the case of an indictment on the 7 & 8 *Geo.* 4, c. 30, s. 16, should not be allowed to the prosecutor. The indictment was for maliciously killing a horse. The defendant was convicted, and sentenced to transportation for fourteen years. An application was made, as soon as the defendant was sentenced, to *Tindal*, C. J., who tried the indictment, to allow the expenses of prosecution. He doubted his power so to do, and, therefore, referred the prosecutor to the Court. The words of the 7 *Geo.* 4, c. 64, s. 22, are these—"That the Court before which any person shall be prosecuted or tried for any felony, is hereby authorized and empowered, at the request of the prosecutor, or of any other person who shall

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April 18th.

Where an indictment on the 7 & 8 *Geo.* 4, c. 30, s. 16, is removed by *certiorari* into the *King's Bench*, and is tried on a record issuing out of that Court, the expenses of prosecution cannot be allowed under the 7 *Geo.* 4, c. 64, s. 22.

(*a*) This and the next case were in *Easter Term*, 1832, and the second in *Trinity Term* of the same year. The first was decided

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appear on recognizance or subpoena, to prosecute or give evidence against any person accused of any felony, to order payment unto the prosecutor of the costs and expenses which such prosecutor shall incur in preferring the indictment, and also payment to the prosecutor and witnesses for the prosecution of such sums of money as to the Court shall seem reasonable and sufficient to reimburse such prosecutor and witnesses for the expenses they shall have ~~severally~~ incurred in attending before the examining magistrate or magistrates, and the grand jury, and in otherwise carrying on such prosecution; and also to compensate them for their trouble and loss of time therein." The "Court" here must mean the Court before which the case was tried. That Court was the *King's Bench*, the record of which the Judge at *Nisi Prius* was trying. The offence here was a felony, and, therefore, if the Court were of opinion that the prosecutor was entitled to his costs, he must be entitled to them under the 22nd section of the 7 Geo. 4, c. 64. There is a decision of the *King's Bench* on section 23, which applies to misdemeanors, in the case of *The King v. Richards and Others (a)*. The case there was—In pursuance of a recognizance entered into before magistrates, the prosecutor, at the Quarter Sessions for *Salop*, preferred an indictment against the defendants for a riot; and the grand jury having found it a true bill, he afterwards removed it into this Court by *certiorari*. The defendants were tried and convicted at the last Spring Assizes for the county of *Salop*; and, in *Easter Term*, *Campbell* moved for a rule to shew cause why the prosecutor should not have his costs allowed under the 7 Geo. 4, c. 64, s. 23, by which it was enacted, "That, where any prosecutor or other person shall appear before any Court, on recognizance or subpoena, to prosecute or give evidence

(a) 8 B. & C. 420; S. C. 2 M. & R. 405.

against any person indicted of any assault with intent to commit felony, of any attempt to commit felony, of any riot, &c. every such Court is hereby authorized and empowered to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as Courts are hereinbefore authorized and empowered to order the same in cases of felony." The Court took time to consider of the application; and afterwards Lord *Tenterden*, C. J., said, that the matter had been considered by the twelve Judges, who were all of opinion that the act did not apply to cases where the indictment had been removed into the Court of *King's Bench* by *certiorari*.

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 —————
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TAUNTON, J.—The Court having already decided on the construction of the 7 *Geo. 4*, c. 64, s. 23, which relates to misdemeanors, it has decided on the construction of section 22, which relates to felonies. Expenses are to be granted "in the same manner" in cases of misdemeanors, "as in cases of felony." The Court, therefore, by deciding that the expenses are not to be allowed in cases of misdemeanor, has, in fact, decided that they are not to be allowed in cases of felony.

Rule refused.

1832.

June 12th.

REX v. The Justices of STAFFORDSHIRE.

Where the Sessions have granted a special case, which has not been settled for more than six months after being granted, the *certiorari* for removing the orders of magistrates and sessions, must be sued out within six months from the time of granting the case. If it is not so sued out, this Court will not grant a *mandamus* to compel the Sessions to enter continuances and hear the appeal.

WHITCOMBE had obtained a rule for a *mandamus* to be directed to the Justices of *Staffordshire*, commanding them to enter continuances, and hear an appeal. The case, which was an appeal against an order of removal, had come on before the Sessions in *June*, 1831, and the Court confirmed the order. On the trial, it was stated by the counsel for the appellants, that a direct authority in their favour was to be found in the books; but they were unable, during the progress of the appeal, to refer the Court to the case. On confirming the order, the Court said that the confirmation should be subject to a case for the opinion of this Court, if the appellants' counsel should be able to find and produce the alleged authority in the course of the Sessions. They did so on the following morning, and the chairman expressed himself satisfied that the decision of the preceding day was wrong, and put it to the respondents to consent to the judgment of the Court being amended by quashing the order. The respondents' attorney refused to consent, and the order therefore stood confirmed, subject to a case. The appellants' attorney received a draft of the case from his counsel, and sent it to the respondents. The counsel for the respondents disputed some facts contained in it, and an application was made to the Sessions, on the part of the appellants, to settle the case at the *January* Sessions following. The Sessions declined doing so, because no notice of the application had been given to the respondents; but the chairman compared the case, as drawn by the appellants' counsel, with his notes, and said it was correct; and, after notice to the respondents, the same case was signed by the Court at the next *Easter* Sessions. No *certiorari*, however, was sued out by the appellants within six months,

as required by 13 *Geo. 2*, c. 18, s. 5 (a). The attorney for the appellants made an affidavit, that this omission arose from the attorney's delay in settling the case.

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 SHIRE.

Shutt and Greaves shewed cause, and cited *Rex v. The Justices of Sussex* (b). The marginal note of that case was in these terms:—"A *certiorari* to remove an order of Sessions, confirming an order of removal, subject to a case to be stated, must be applied for within six calendar months after making the order of Sessions, and not within six months after settling the case." It may be said that the decision of the Sessions was not absolute, but conditional: but, though conditional at first, it became absolute in six months, unless a *certiorari* was sued out within that period. Being absolute, the Court would not interfere in a matter within the decision of the Sessions. *Rex v. The Justices of Worcestershire* (c). *Rex v. The Justices of Monmouthshire* (d). The proper course would have been to have sued out the *certiorari* immediately after granting the case, although it was not then settled. That was the constant practice at every Sessions. The application in the present case had been made on the authority of *Rex v. The Justices of Suffolk* (e). The marginal note of that case was this:—"Where the Quarter Sessions have confirmed an order of removal, subject to a case for the opinion of the Court of *King's Bench*, and the Justices cannot agree for several Sessions on the terms of the case, this Court will grant a *mandamus*, commanding them to enter continuances, and hear the appeal; for, the order of Sessions being only conditional, there is no decision, unless the case is returned." But, in that case, the *certiorari* had been issued within the six months. It having issued, no judgment could be pronounced, unless the case were

(a) 1 Chit. Stat. 133.

(b) 1 M. & S. 734.

(c) 1 Chit. Rep. 649.

(d) 4 B. & C. 844; S. C. 7 D. & R. 334.

(e) *Ante*, p. 163.

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signed and sent up, or the Sessions reheard it. That case, therefore, did not support the application.

Whitcombe, contra.—From the circumstances under which the Sessions granted this case, they clearly acknowledged that their judgment, as it stood, was wrong; granting a *mandamus* was the only means of setting it right. This, therefore, was one of those cases, in which, if the Court saw justice could not be done without granting a *mandamus*, they would grant it. It was said, that it was too late to sue out a *certiorari*. That might be so in ordinary cases; but a *mandamus* could only be obtained where the ordinary remedies failed; for, that was an extraordinary remedy. Here the ordinary remedies had failed; and therefore this case stood on the same footing with all others, where the intervention by *mandamus* is sought. He contended that *Rex v. The Justices of Suffolk* was precisely in point. The judgment of *Parke, J.*, contained this passage:—"If there has been no improper delay, I think a *mandamus* ought to go to the justices, to enter continuances to hear the appeal, for they had not absolutely decided it." Here the appellants had been guilty of no "improper delay;" they had been amused by frivolous objections and delays, and therefore they were entitled to the same assistance which the Court granted in *Rex v. The Justices of Suffolk*. He also cited *Rex v. The Justices of Sussex (a)*, and the case of *Rex v. The Justices of Pembrokeshire (b)*, as cases in point.

PATTESON, J.—It seems to me that this case differs from all those which have been mentioned: but I will give my opinion to-morrow morning. I think that this is nothing more than an attempt to cure the *laches* of the party who ought to have sued out the *certiorari*, in not suing it out.

(a) 2 Bott, P. L. 751, ed. 5.

(b) 2 B. & Adol. 391.

All the cases stated are where the Sessions had done something wrong. Here the Sessions have done all they could. In *Rex v. The Justices of Pembroke*, all the steps the party could take, had been taken.

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PATTESON, J.—I am clearly of opinion that I ought not to make this rule absolute. The case of *Rex v. The Justices of Suffolk*, which was relied upon in support of this rule, is quite different from the present case. There, a *certiorari* had been sued out in due time; and that is the ground on which I think the present is distinguishable from all former cases. In all the cases where the Court has interfered by *mandamus*, such proceedings had been taken by the appellant, that, if the case had been settled, the matter might be discussed in this Court. Now, if the case here had been actually settled by the parties at the proper time, no *certiorari* having been issued, it could not have been brought before the Court. It was clearly the duty of the appellant to sue out a *certiorari*, whether the case was settled or not. If he chooses to let the six months pass, he does so at his peril. The effect of making this rule absolute would be to make good the *laches* of the appellant, and would be to do that circuitously which could not be done directly. It would be the same in effect as if we were to issue a *certiorari* after six months had expired. The rule must be discharged, with costs, as it is a novel application.

Rule discharged, with costs.

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Nov. 6th.

LADBROOK v. HEWETT.

A mere honorary obligation on the part of a plaintiff not to press a defendant for payment of debt and costs, is not such an indulgence to him as will release his bail.

If a plaintiff, by an agreement with a defendant, expedites his remedy against him, the bail are not thereby released.

PLATT shewed cause against a rule for setting aside a judgment on a *sci. fa.* against bail. The grounds on which the rule was obtained were two: first, that the plaintiff had given time to the defendant; and secondly, that the bail had not been summoned, and had not received any notice of the proceedings by *sci. fa.* against them. Notice of trial was given for the sittings in last *Hilary* Term. The defendant's attorney before trial called on the plaintiff, and offered, on the part of his client, to give a *cognovit* for the amount of debt and costs. The offer was accepted, and the *cognovit* given. The defendant afterwards requested that the plaintiff would give him time to pay the debt and costs. The plaintiff told the defendant he "might rely on his honour." These are the facts. The principle on which bail are held to be released, in consequence of the plaintiff dealing with the defendant, is, that the plaintiff, having entered into an agreement with the defendant, has thereby placed the bail in a worse situation than they would otherwise be. But, *first*, there has been no indulgence granted here; for, the mere honorary vague answer of the plaintiff to the defendant's request for time, cannot be considered as an indulgence to him. *Secondly*, by taking the *cognovit*, the bail have been placed in no worse situation. The trial was to have taken place at the sittings in *Hilary* Term. The *fi. fa.*, consequently, could not have been made returnable until *Easter* Term. The bail were, therefore, placed in no worse situation by the plaintiff's accepting the *cognovit*; but, on the contrary, in a better situation, because by it the remedy of the plaintiff against the defendant was accelerated. Then, as to the objection that the bail had not been summoned, or served with notice, a Judge's order has been made, empowering

the plaintiff to sign judgment on the *sci. fa.* It is, therefore, now too late to take that objection.

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Follett contended that the plaintiff must, under the circumstances, be considered as having given time to the defendant, and, therefore, that the bail were released.

LITLEDALE, J.—The plaintiff was not bound at all by the answer he gave to the defendant's request for time to pay the debt and costs, and therefore he could not be considered as granting him any indulgence. By taking the *cognovit*, the plaintiff did not place the bail in a worse situation, but rather in a better one than that in which they would have been if no *cognovit* had been taken. As to the want of notice to the bail of this proceeding by *sci. fa.* against them, as a Judge's order for signing judgment has been made, we cannot now inquire into the sufficiency of the notice. If the bail had intended to avail themselves of that objection, they should have applied to set aside that order. The rule must, therefore, be discharged.

Rule discharged.

CARTWRIGHT v. BLACKWORTH.

Nov. 6th.

ALEXANDER shewed cause against a rule for an attachment for non-payment of money pursuant to an award and the Master's *allocatur*. In this case an action was brought to recover a certain sum alleged to be due from the defendant to the plaintiff. Before trial the cause was referred to an arbitrator, with power to determine what was due from the former to the latter. The arbitrator di-

If a party against whom a rule is granted, obtains its enlargement, he cannot afterwards object that it was not personally served.

In an award, the direction to enter a verdict

in favour of a plaintiff for a certain sum, is equivalent to an order to pay that sum.

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rected a verdict to be entered for the plaintiff for 204*l.*, and also ordered the defendant to pay the plaintiff the costs of the reference, which amounted to a sum of 48*l.* A demand of both sums was afterwards made upon the defendant, but they were not paid. A rule *nisi* was obtained in the last term for an attachment for non-payment of them. That rule was enlarged to the present term by consent. As a preliminary answer to the rule, I object that there has been no personal service of the original rule on the defendant, and that the enlargement of the rule by consent is not a ground for waiving personal service. The cases in which the enlargement of a rule has been held to amount to a waiver of personal service, are those in which some communication between the parties can be proved or presumed to have taken place, and the necessity for personal service has consequently been waived. Here, no such communication has taken place.

LITTLEDALE, J.—Upon principle, I think it is a waiver; because, by not objecting to the want of personal service at the time of enlarging the rule, you take the plaintiff off his guard; as he might have applied to the Court to be allowed to dispense with personal service.

Alexander.—Then, I submit that the award is not valid; and, if so, no attachment lies. The submission gives the arbitrator power to determine the question at issue between the parties; but, instead of so doing, he directs a verdict to be entered. That was beyond his power. *Hutchinson v. Blackwall* (a) is in point. Besides, he makes no order for the payment of any sum of money by the defendant to the plaintiff. As none is directed to be paid, the plaintiff cannot proceed by attachment for the non-payment of this

(a) 1 Moore & Scott, 513; S. C. 8 Bing. 331.

money. In the case of *Edgell v. Dullimore* (a), the Court of *Common Pleas* refused to grant an attachment for non-payment of money pursuant to an award, where the award merely found a debt to be due, but did not contain any order to pay. The Court there said, that the defendant was not in contempt, and, therefore, no attachment could issue; the plaintiff must be left to his action. The language of the Court in that case applies to the present. The arbitrator has directed a verdict to be entered in favour of the plaintiff for 204*l.*, which is, in fact, saying that he finds the defendant to be indebted to the plaintiff in that amount. But he has not directed the defendant to pay that sum. There, the Court decided that the order to pay did not follow as an inference from the finding of the debt to be due. The order to pay, therefore, cannot be inferred in this case from the fact of the arbitrator directing a verdict to be entered in favour of the plaintiff for the sum in question. If so, the defendant cannot be in contempt for not paying a sum of money which he was not ordered to pay. The demand in this case was of 204*l.* for damages, and 48*l.* for costs. Although there was an order made by the arbitrator for the payment of the costs by the defendant, yet, as the amount of damages could not be demanded, the plaintiff is not entitled to have an attachment even for the costs, which he might demand. The case of *Strutt v. Rogers* (b) decided, that, if a party in whose favour an award is made, demand more than is due to him, he cannot have an attachment for the non-payment, on that occasion, of the sum which is due. Here, the sum really due was the amount of costs; and the plaintiff, having demanded a larger sum than was due, is not entitled to his attachment even for the amount of costs, which is due.

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(a) 11 B. Moore, 541; S. C. 3 Bing. 634.

(b) 7 Taunt. 213.

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Kelly supported the rule.—It is true, that, in this case, the arbitrator has technically made a mistake in the form of his award. The arbitrator does not award in express terms that the defendant shall pay the sum of 204*l.*; but, forgetting for a moment that he was not making an award under an order of *Nisi Prius*, he has merely directed that a verdict should be entered for the sum of 204*l.* Arbitrators are not bound to use precisely technical words; and if the meaning of an arbitrator can be collected from his words, it is sufficient to support the award. It is quite clear, from the language of the award, that the arbitrator intended the defendant to pay that sum to the plaintiff. The only remedy which the plaintiff has to enforce that intention, is by attachment, as he can bring no action; for, it would be impossible to introduce averments so as to support an action. At any rate he is entitled to his attachment for the costs. The submission to the arbitrator is, first, of all matters of difference in the cause, and then there is an express provision that the costs shall be in the discretion of the arbitrator. I admit, that, if a demand is made of a larger sum than is due, the plaintiff cannot have an attachment for the non-payment of the smaller sum. But here there was a demand of both sums, namely, of the 204*l.* for the damages, and of the 48*l.* for the costs. There is, therefore, no objection to the attachment on the latter ground.

LITTLEDALE, J.—I am of opinion that this rule ought to be made absolute. The arbitrator, by directing a verdict to be entered for 204*l.*, has done that which is tantamount to directing that sum of money to be paid by the defendant to the plaintiff. He does not use so many words, but he directs that to be done which will enforce payment. If a verdict were entered for that sum, the plaintiff might, in due course, issue execution for that amount. In the case of *Edgell v. Dallimore*, the *Common Pleas* would

not grant an attachment, because the arbitrator had not directed any sum of money to be paid. But here he has given such a direction. That being my opinion on this point, it is unnecessary to enter into the question as to the costs.

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Rule absolute.

BROOKES v. HUTCHINSON.

Nov. 7th.

CHADWICK JONES applied to the Court for a rule *nisi* for the discharge of an insolvent debtor from custody, in which he was detained for rent alleged to have accrued due for certain premises formerly in the occupation of the insolvent. The affidavit on which he moved, stated, that the defendant had been detained at the suit of the present plaintiff for certain rent due from the latter to the former, for a house at No. 5, *Harcourt Street, Mary-le-bone*. He presented a petition on the 14th of *April* to the Insolvent Court; and, being opposed by the plaintiff, he was remanded for six months. His imprisonment expired on the 14th of *October*. In his schedule he stated the lease of the premises in question. On the 12th of *October* he was detained at the suit of the plaintiff for half a year's rent, become due on the 29th of *September* last, in respect of the same premises. The present application therefore was, that the defendant might be discharged out of custody, he having surrendered the lease he held from the plaintiff, and ceased to have any interest in the premises.

The 7 Geo. 4, c. 57, the Insolvent Act, only applies to rent due at the time of the insolvent obtaining his discharge.

LITLEDAL, J.—This detainer is for rent which has accrued since the discharge of the defendant. If the defendant is not liable for this rent, that is a ground of defence to an action for it, but not a ground for an application to this Court. He can only be discharged by the Court, on

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the ground of his having taken the benefit of the act in respect of the debts for which he is detained, and which must have been due at the time of his discharge.

Comyn appeared to oppose the application.

Rule refused.



Nov. 9th.

THORPE v. HOOK.

Where a defendant moves to set aside a *ca. sa.* on the ground of misnomer, the affidavits in support of the motion must be intitled in the right name.

ERLE shewed cause against a rule obtained by *W. H. Watson*, to set aside a *ca. sa.*, and discharge the defendant out of custody, on the ground of the misnomer of the defendant. He took a preliminary objection, that the affidavits in support of the rule were improperly intitled. They were intitled *Benjamin Thorpe* against *John Hook*; and it was alleged in the affidavit, that the bill was filed, and final judgment had against the defendant, by the name of *James Hook*, but the *ca. sa.* was issued against him by the name of *John Hook*. The bill and judgment being against "*James*," the affidavits ought to have been so intitled. He cited *Forbes v. Diemar* (a), and *Doe d. Spencer v. Want* (b).

W. H. Watson, in support of the affidavits, contended that they ought to be intitled according to the *ca. sa.*: the Court could look no further than that, and the affidavits agreed with the *ca. sa.*

LITLEDAL, J.—There must have been a judgment. You cannot suppose a *ca. sa.* issued without one. The officer would not allow the writ without seeing the judg-

(a) 7 T. R. 661.

(b) 8 Taunt. 647.

ment. Why not intitle them as you would a plea in abatement, *A. B.* sued by the name of *C. B.* The affidavits are wrongly intituled. You must move again.

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Rule discharged (a).

(a) See further proceedings in this case, *post*.

DOE v. ROE.

Nov. 10th.

ERLE moved for judgment against the casual ejector. The declaration was served in the vacation of *Hilary* Term, and required an appearance in *Easter* Term. That term and *Trinity* Term had both elapsed without any application being made for judgment against the casual ejector.

If two terms elapse after the service of a declaration in ejectment, the Court will not grant a rule for judgment against the casual ejector on that service.

LITTLEDALE, J.—If you only allow one term to go by after the service, I can grant the rule; but, if you permit two terms to elapse, I cannot grant it. It is contrary to the practice of this Court.

Rule refused.

Ex parte HIGGS.

Nov. 10th.

MILLER made an application to the Court, requiring an attorney to pay over a sum of money which it was alleged he detained improperly in his possession.

Unless there is a cause in Court, an application cannot be made at Chambers against an attorney.

LITTLEDALE, J., suggested, that the application might have been made by summons at chambers, as a less expensive method of proceeding.

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The Master stated, that, as no cause appeared to be in Court, an application could not be made against an attorney at a Judge's chambers.

LITLEDALE, J., permitted the application to be made.



Nov. 10th.

PIERCE v. EMMA DAVIDSON.

Where a prisoner, brought up under the compulsory clauses of the Lords' Act, is not prepared with her schedule, and she refuses to claim her sixty days, the Court is bound to allow them to her.

THE defendant in this case was brought up before the Court, under the compulsory clauses of the Lords' Act, the 32 Geo. 2, c. 28, at the instance of the plaintiff, for the purpose of compelling her to assign her property. When she appeared, she was not prepared with her schedule. She was asked whether she claimed her sixty days, for the purpose of preparing it. She said, she would not claim her sixty days, and that, rather than assign her property for the benefit of the plaintiff, she would be transported.

Platt, on the part of the plaintiff, contended that the defendant was in contempt by not claiming her sixty days; and, therefore, the plaintiff was at liberty to prosecute her.

LITLEDALE, J.—It appears to me that the clause (s. 17) under which the sixty days are allowed to the prisoner, does not render it necessary for her to *claim* those days, but the Court is to *allow* them to her. She must, therefore, be prepared with her schedule in sixty days from this time. The defendant must be remanded for sixty days to the custody from which she has now been brought.

Prisoner remanded.

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THOMSON'S Bail.

Nov. 12th.

R. V. RICHARDS opposed a bail, who had made the affidavit required by R. 3, Reg. Gen. *T. T. 1 Will. 4 (a)*, on the ground that his residence was not stated in the notice of bail. The bail was described as "of 41, *Fetter Lane*." On examination, it appeared that he did not sleep at 41, *Fetter Lane*, but at lodgings elsewhere. He had, however, a servant sleeping there, and he himself took refreshments there occasionally. By affidavit, it appeared that the person searching for the bail had found a sale advertised as about to take place at 41, *Fetter Lane*, but that he had discovered the bail and his lodging. Under these circumstances it was submitted, that the real residence of the bail was not described in the notice, and, therefore, he must be rejected.

It is not necessary that a bail should sleep in the house described in the notice of bail as his residence. Costs of justification will sometimes be refused, although the bail have passed.

C. Phillips, in support of the bail, contended, that, as, if a burglary were committed in No. 41, *Fetter Lane*, that house might be described as the dwelling-house of the bail, he occupying it by his servant, the description given by the notice of the bail's residence was correct.

LITLEDALE, J.—I think the residence stated in the notice must be considered as the residence of the bail. The bail may, therefore, pass.

C. Phillips then applied for the costs of justification under R. 3 of *T. T. 1 Will. 4 (b)*, the bail having justified.

LITLEDALE, J.—No; I think the plaintiff had a right, under these circumstances, to compel a justification in open Court.

Costs refused.

(a) *Ante*, p. 103. (b) *Ante*, p. 103. See *Evans' Bail*, *ante*, p. 385.

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Nov. 13th.

FENN v. WILD.

The Court will not grant an application requiring an attorney to pay over the interest of a sum of money which has come improperly into his hands.

WHITCOMBE moved for a rule to shew cause why an attorney, whose name he mentioned, should not pay over a sum of money, *with interest*, it appearing that the money had come into his hands in consequence of misrepresentations on his part.

LITLEDALE, J.—The Court cannot grant your application as to interest. But, under the circumstances of the case, you may take your rule as to the principal.

Rule granted as to the principal, and refused as to the interest.

Nov. 13th.

WILLES v. JAMES.

In the statement of a particular date in an affidavit, where that date is essential, it must be stated positively.

GODSON moved to enter up judgment on an old warrant of attorney. The affidavit was dated the 20th *November*, and the party making it stated, that "he verily believes that the defendant is alive, for he saw and conversed with him *about* six days since."

LITLEDALE, J.—Mr. Justice *Lawrence* many years ago said, that the word "about" depends on the conscience of the party making the affidavit. You must make another affidavit, for the one with which you are now furnished is insufficient.

Rule refused.

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SMITH'S Bail.

Nov. 13th.

V. RICHARDS opposed bail, on the ground that the residence was too generally described in the notice. They were described as "of *Chigwell Road*," without stating any street in that place.

The residence of a bail is sufficiently described by stating it to be at a place well known, as a village, without mentioning any street in it.

LITLEDALE, J.—The place of which they are described is well known as a village. It is not, therefore, necessary to mention any street in it. The description is sufficient.

Bail passed.

Lane v. Hope - 27. L.J. Q.B. 78. 82.

ARUNDEL v. CHITTY.

Nov. 14th.

W. H. WATSON shewed cause against a rule obtained by *Erle*, calling on the plaintiff to shew cause why the defendant should not be discharged out of custody. The facts were these:—In the month of *July*, a writ of *ca. sa.* issued against the defendant at the suit of the plaintiff, directed to the sheriff of *Wiltshire*. Afterwards a letter was written to the under-sheriff by the plaintiff, directing him not to execute the writ until further instructions should be received by him, but at the same time desiring him not to discharge the defendant out of custody, if he was in custody. Soon after this letter reached the hands of the under-sheriff the defendant was taken into custody in a cause of *Bastard v. Chitty*. This custody proved to be illegal, because an arrangement had been made between the parties, and the warrant withdrawn; but notice of this had not been given to the under-sheriff at the time of the arrest. The writ in this cause having come, as before

If, while a *ca. sa.*, at the suit of a plaintiff, is lying in the hands of the sheriff, the defendant is illegally taken into custody at the suit of another person, the *ca. sa.* attaches, and the sheriff cannot discharge the defendant.

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mentioned, to the hands of the sheriff, and the defendant being actually in custody, although it was wrongful, he conceived the writ of *ca. sa.* operated as a detainer. It was admitted by the plaintiff, that the exception in the plaintiff's letter was intended only to apply in case the sheriff had taken the defendant at the suit of the plaintiff; in which case the plaintiff did not intend to waive his execution, and, therefore, that the present detention was contrary to his wish. The question, therefore, was, whether this was in fact a lawful detainer of the defendant. He submitted that it was; and that, if the plaintiff consented to the discharge of the defendant, the judgment would be satisfied.

Erle supported the rule, and contended, that, as the writ was only to be executed conditionally, and as the custody of the defendant, at the time the under-sheriff received the writ, was illegal, the defendant could not now be considered as rightfully detained.

Cur. adv. vult.

LITLEDALE, J.—On looking into the cases, it appears to me that the defendant is properly in custody. He was in custody at the time the *ca. sa.* was lying in the hands of the under-sheriff; and by operation of law the writ attaches from the time he is in custody, though at the suit of another. I cannot, therefore, interfere to discharge the defendant.

Rule discharged.

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HAMLET'S Bail.

Nov. 15th.

THESISIGER opposed bail, on the ground of a defect in the notice of bail. They were there described as "jewellers," but, on examination, they stated that they were only clerks in the house of the defendant, who is a jeweller, but were not engaged in any part of the business.

To describe bail as "jewellers," when they are merely clerks in a jeweller's shop, is a misdescription.

LITLEDALE, J.—That is certainly a misdescription: but I shall give the defendant time to give a fresh notice.

Time given to give a fresh notice.

THORPE v. HOOK.

Nov. 15th.

SCIRE facias to revive a judgment more than a year old, against *James Hook*. The judgment, and all prior proceedings, were in the name of *John Hook*. Afterwards, two writs of *sci. fa.* were issued and returned *nihil*. The award of execution, the *ca. sa.*, and the warrant, were against *James Hook*. The plaintiff obtained a rule *nisi* to amend the two writs of *sci. fa.*, the sheriff's return, the award of execution, the *ca. sa.*, and the warrant, by inserting the name of *John* instead of *James*, according to the judgment roll. The defendant, who had been taken in execution, obtained a rule *nisi* for his discharge out of custody, on the ground of the variance between the *sci. fa.* and subsequent proceedings, and the judgment and prior proceedings. The two rules came on together.

In *sci. fa.* on a judgment more than a year old, if the writs of *sci. fa.*, which have been returned *nihil*, the award of execution, the *ca. sa.*, and the warrant, are issued in a different Christian name from the one stated in the judgment as that of the plaintiff, the Court will allow the proceedings to be amended by substituting the one stated in the judgment, although the *ca. sa.* has been executed and returned.

W. H. Watson contended—First, that the *ca. sa.* could

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not be amended after it was returned, as was the case here, although there were instances of a *ca. sa.* being amended after it had been executed, and before its return;—*Secondly*, there was nothing by which it could be amended, unless the two writs of *sci. fa.*, the sheriff's return, and the award of execution should be amended. It was certainly now not to be contended, that a *scire facias* was not amenable, but in the present instance the application was too late. From 2 *Wms. Saunders*, 72, and *Grey v. Jefferson* (a), it appears that it was too late to amend a *scire facias* after a plea of *nul tiel record*. If, then, a *scire facias* was not amendable on *nul tiel record* pleaded, *à fortiori* the Court would not amend a *scire facias* after an award of execution, where the proceedings were by *nihil*, in which cases the Court required the greatest strictness. But, supposing the application to be in time, the Court would not amend the award of execution, as there was no instance on record where proceedings were amended if the plaintiff proceeded by two *nihil*s. As to the second point, if the writs of *scire facias* could be amended, the Court could not amend the sheriff's return. The Court had no power to do so; for, the statute of *Henry the Sixth* only empowered the Court to amend the sheriff's return for the misprision of the clerk. But this was not a mere misprision. Yet, if the Court could amend, they would not do so, as it might operate to the prejudice of the sheriff. The sheriff was not obliged to return *nihil*, although the practice was almost inveterate for him so to do. If the defendant gave notice of render, and the sheriff did not summon him, but returned *nihil*, whereby the defendant was injured, an action on the case would lie against the sheriff. Returns of the sheriff were never amended except on the application of the sheriff himself. If the return were amended, the award of execution would be bad

(a) 2 *Strange*, 1165.

on the face of it, if awarded where there was not a sufficient return of record.

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Erle, contra, contended, that the writs of *sci. fa.* might be amended, and that the application did not come too late. He cited *Hampson v. Chamberlain* (a), where the entry upon record was amended according to the writs of *scire facias* and *certiorari*, and the returns thereof, after issue joined, upon a plea of *nul tiel record*; *Sweetland v. Beesley* and *Broune* (b); where a *scire facias* against bail, and all the proceedings thereupon, were ordered to be amended by the record in the original action, by inserting the word *Merchant* instead of *Mercer*, being the defendant's addition, after issue joined upon *nul tiel record*; *Braswell v. Jaco* (c); where the Court ordered writs of *scire facias* on a judgment, and declaration thereon, to be amended conformably to the judgment roll: *Perkins, Administrator, v. Petit* (d), where a *scire facias* against bail in error was amended by the record of the recognizance: and *Mann v. Callow and Another* (e), where, in a *scire facias* against bail, the recognizance was to satisfy the "damages" only, the Court allowed it to be amended by introducing the words "the debt and" before the word "damages." Then, as to the return of the sheriff, the Court had clearly a power to amend that return under the 8 Hen. 6, c. 12, s. 2. The word "return" was introduced into the section itself. The amendment may be made by the Court, where the defect arises from the misprision of the clerk. The defect here was clearly a misprision.

Cur. adv. vult.

LITLEDALE, J., after recapitulating the facts of the

(a) Barnes, 3.

(b) Id. 4.

(c) 9 East, 316.

(d) 2 B. & P. 275.

(e) 1 Taunt. 221.

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case.—It seems, from considering all the cases on the subject, that the amendment, in such cases as the present, is a matter for the discretion of the Court. If, in this case, the defendant could shew that he would sustain any disadvantage in consequence of permitting the amendment prayed, I should not perhaps allow it; but that not being shewn, I shall permit the writs of *sci. fa.* to be amended. But then it is said, that the Court cannot amend the return of one of its officers. But the 8 *Hen. 6*, c. 12, s. 2, directly authorizes the Court to amend the returns of its officers, where the defect has arisen from the misprision of the clerk; and there are numberless instances in *Viner's Abridgment*, where amendments quite as extensive as the one here prayed have been allowed by the Courts. It appears to me, that, assuming the writs of *sci. fa.* to be amendable, the Sheriff might be called into Court, and desired to amend his return accordingly; in the same manner that, in a case in 2 Lord *Raymond*, 1060, “a *sci. fa.* out of the *Petty Bag*, returned in the *Queen's Bench*, to repeal the Queen's letters patent granted to *Wells*, was amended, and *Sprig*, a man's name, was amended, and made *Spring*, by the instructions given to the clerk of the *Petty Bag*; and the clerk of the *Petty Bag*, who made out the writ, was sent for to amend it; because, he who made it ought to amend it; and the Court examined him touching the truth of the instructions.” Then, it is said, that, as the *ca. sa.* is executed, there is nothing to amend by. Certainly, if you go at once from the judgment to the *ca. sa.*, there is nothing by which it can be amended. But, when the previous steps are amended, there is something to amend by. Then, it is said, that the *ca. sa.* cannot be amended after it is executed. But this appears to have been done in the case of *Browne v. Hammond (a)*, in which case the writ was amended by the record of the

(a) Barnes, 10.

judgment making the defendant's name *Edmund* instead of *Edward*. So, in *Mackie v. Smith* (a), a *ca. sa.* was amended after it had been executed, by altering the name of the plaintiff in the writ from *John* to *James*, the real name of the plaintiff. The constant current of practice has been to permit amendments in such cases. The rule must therefore be made absolute for the amendment. But, as this application has been rendered necessary by the plaintiff's negligence, I think he ought to pay the costs of both motions, as was done in the case of *Hunt v. Kendrick* (b).

1832.
THORPE
v.
HOOK.

Rule absolute accordingly.

(a) 4 Taunt. 322.

(b) See *Hunt v. Kendrick*, 2 Black. 836.

STURGESS v. CLAUDE.

Nov. 16th.

THIS was an application on the part of the sheriff, under the 1 & 2 Will. 4, c. 58, s. 6 (a), to be relieved from the conflicting claims made on property which had been seized by him.

The 1 & 2 Will.
4, c. 58, does
not apply to
claims in equity.

Busby appeared for certain parties who had filed a bill in equity against the defendant, as executors of his father, and which parties laid claim to the property in question, as part of the father's estate.

Goulburn, Serjt., on the part of the execution-creditor, contended that the party for whom Mr. *Busby* appeared had no such claim upon this property as could be noticed by the Court under the Interpleader Act. As he had thought proper to file a bill against the defendant, he

(a) 2 Dowl. Stat. 571.

1892.
STURGESS
v.
CLAUDE.

must abide by the remedy he had selected. The Interpleader Act only applied to proceedings at law.

PATTERSON, J.—I do not think the act applies to claims set up in consequence of proceedings in equity.

The rule was then discharged, on terms agreed on between the parties.

Re Lewis v. Burton. J.C.B. 102.

Nov. 17th.

STOUT v. SMITH.

Special service
of rule.

BYLES moved to make a rule absolute for referring it to the Master to compute principal and interest on a bill of exchange. The rule had been served in the following manner:—The defendant was away from his chambers; but a board was stuck up at the door, directing letters and parcels to be left at the hair-dresser's. The rule had been left there, and the hair-dresser said that he was in the habit of receiving letters and parcels for the defendant.

LITLEDALE, J.—That will not do. The service is not sufficient.

Rule discharged (a).

(a) See *Englehart v. Morgan*, Gent., one &c., ante, p. 422.

1832.

REX v. PAGE.

Nov. 19th.

V. LEE moved that a defendant might be allowed to plead *in forma pauperis* to an indictment for perjury. The indictment had been preferred before and found by the grand jury at *Clerkenwell*, and removed by *certiorari* into the *King's Bench*. The defendant had made an affidavit that he was not "worth 5*l.* in the world, his wearing apparel only excepted, and all his just debts being paid."

To an indictment in the *King's Bench*, a defendant will be allowed to plead *in forma pauperis*, on making an affidavit that he is not worth 5*l.*, &c.

LITLEDALE, J.—You may take your rule.

Rule granted.

REX v. The Justices of STAFFORDSHIRE.

Nov. 21st.

GREAVES moved for an attachment against the overseers of the poor of the township of *Stanton*, in the county of *Stafford*, on the following facts:—A rule *nisi* (a) for a *mandamus* had been granted last *Easter Term*, at the instance of *Stanton*, calling on the justices of the peace of *Staffordshire* to shew cause why a *mandamus* should not issue to rehear an appeal, upon notice to be given to them, and also to the churchwardens and overseers of the parish of *Mayfield*. Upon shewing cause against this rule, it was discharged generally, "with costs." The justices did not appear by counsel to oppose the rule; but the churchwardens and overseers of *Mayfield* did. The rule was drawn up, "with costs to be paid to the said defendants, the justices, or their attorney." It appeared, by the affidavit of the attorney for the churchwardens and overseers of *Mayfield*, that the overseers of *Stanton* had been duly served with the rule, and had refused to pay

Where a rule *nisi* for a *mandamus* to justices to hear an appeal is discharged with costs to be paid to the justices by the appellants, the parish which appeared to support the refusal of the justices is not entitled to its costs, although served with the rule *nisi*, and although the justices did not appear by counsel.

(a) See the report, *ante*, p.484.

1832.
} **REX**
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The Justices of
STAFFORD-
SHIRE.

the costs, which were allowed by the Master of the Crown Office—

Whitcombe objected that the overseers of *Stanton* were not bound to pay the costs of any but the Justices.

Greaves urged that the present rule was drawn up according to the general practice where rules *nisi* for *mandamus* had been discharged under similar circumstances. He cited *Rex v. Justices of Monmouthshire* (a), where this had been done. He contended that the justices were merely trustees for the parties interested. The present case was like the case of a *certiorari* to remove an order, where the parish officers opposed the rule; and it had never been doubted that such officers were entitled to their costs, where the rule was discharged generally with costs.

LITLEDALE, J.—The parish officers were not entitled to their costs under this rule; and, therefore, the attachment cannot be granted. There was another case which lately occurred, in which the rule *nisi* for a *mandamus* had been discharged, with costs to be paid to the justices, but without costs to the parish officers.

Attachment refused (b).

(a) 1 B. & Ad. 895.

(b) See 1 Will. 4, c. 21, s. 6; 2 Dowl. Stat. 41, n. (c).

1832.

REX v. WOOD.

Nov. 23rd.

HUTCHINSON shewed cause against a rule obtained by *White*, for an attachment against the defendant for not obeying a *subpœna* issued out of this Court, to appear at the Quarter Sessions. The affidavit on which the rule was obtained, did not state, that, at the time of serving the copy of the *subpœna*, the original was shewn. It should appear, he contended, that the original had been shewn at the time of serving the copy.

In order to obtain an attachment for disobedience to a *subpœna* requiring the attendance of a witness at the Quarter Sessions, the original *subpœna* must be shewn at the time of serving a copy.

LITTLEDALE, J.—The original ought to be shewn at the time of serving the copy, in order to justify the issuing of an attachment.

Rule discharged.

KING'S BAIL.

Nov. 24th.

HUTCHINSON opposed bail, on the ground that only two days' notice of bail had been given, instead of four, as required by the rules of *T. T. 1 W. 4 (a)*.

The rules of *T. T. 1 W. 4*, requiring four days' notice of bail, do not apply to the case of a prisoner.

Platt, in support of the bail, contended that those rules did not apply to the case of a prisoner. The defendant here was a prisoner, and therefore the notice was sufficient.

LITTLEDALE, J.—The rule does not apply to the case of a prisoner.

Bail passed.

(a) *Ante*, p. 102.

1832.

Nov. 24th.

ASKEW v. HAYTON.

The return of a *certiorari* must return the record itself, and not set it out according to its tenor.

BLACKBURN shewed cause against a rule which had been obtained for quashing a *certiorari* and the return to it, and issuing a *procedendo*, on the ground that it did not return the record itself, but merely stated it according to its tenor. That was sufficient.

Wightman, contra, cited *Palmer and Another v. Forsyth and Bell* (a), where a *certiorari* issued to remove a cause from an inferior Court, and the Court below returned a copy of the record, and not the record itself; the Court quashed the writ and return, and awarded a *procedendo*.

LITTLEDALE, J.—The rule must be made absolute.

Rule absolute.

(a) 4 B. & C. 401.

Nov. 24th.

JOHNS v. MILLS.

In all cases of applications to the Court, whether successful or not, the affidavits in support of them must be filed.

JUSTICE having been unsuccessful in a motion for a rule *nisi*, applied to the Court for permission not to file the affidavits on which the motion was made.

LITTLEDALE, J.—They must be filed. It is contrary to the invariable practice of the Court not to do so.

Application refused.

1832.

Ex parte OWEN.

Nov. 24th.

V. LEE applied to re-admit an attorney, and, his affidavit proving imperfect, he requested permission to produce an amended affidavit at Chambers.

All matters relating to the re-admission of attorneys must be settled in term time, in Court, and not at Chambers.

LITLEDALE, J.—This is never done. These matters must always be settled in open Court during term.

Application refused.

SUTTON v. LORD CARDROSS.

Nov. 24th.

THESIGER shewed cause against a rule for setting aside a *ca. sa.*, and all proceedings on it, on the ground that it was tested in the name of Lord *Tenterden*, who was alive on the first day of *Michaelmas* Term, although it was not issued until after his death. The question was, whether this amounted to an irregularity. He contended that it did not, according to the principle of relation. Thus, all judgments, at whatever time signed, related back to the first day of the term in which, or immediately subsequently to which, they were signed. The writ might therefore be tested in the name of the Chief Justice who was alive on the first day of term.

Where a *ca. sa.* is issued in the course of a term, tested in the name of a Chief Justice who was dead at the time of issuing the writ, but alive on the first day of the term, the Court will not inquire into the exact day of issuing the writ, but will consider it regular, as on the face of it the teste is proper.

Kelly, in support of the rule, contended that the writ could not be so tested.

Cur. adv. vult.

PATTESON, J.—I have consulted the other Judges, and we are of opinion that we ought not to enter into the question as to the exact day on which the writ was issued.

1832.
 }
 SUTTON
 v.
 Lord
 CARDROSS.

If we did, we should destroy the principle of relation which has always obtained in practice, that a writ issued at any time in term has relation to the first day of it. As the writ is right on the face of it, we cannot enter into the question as to whether it was issued on the day on which it bears date.

Rule discharged, without costs.

Nov. 24th.

Ex parte WATTS.

The undertaking of an attorney can only be enforced by attachment, where he has given it for his client.

CAMPBELL applied for a rule *nisi* for an attachment against an attorney for not fulfilling his undertaking. A person had become indebted to the plaintiff for various sums of money, which he was unable to pay. The attorney against whom the present application was made, gave his undertaking to the present applicant for the payment of those sums. Although he was an attorney, he did not act as the attorney for the debtor. The undertaking thus given he had not fulfilled.

LITTLEDALE, J.—There is no case in which the Court has interfered to attach an attorney for the non-fulfilment of his undertaking, unless he is engaged as attorney in the cause in which the undertaking is given.

Rule refused (a).

(a) See *Walker v. Arlett*, ante, and *Bursell v. Jones*, 3 B. & Ald. p. 61; *In re Paterson*, ante, p. 468; 47.
In re Greaves, 1 C. & J. 374, n.;

1932.

Nov. 5th.

WOOD v. MOSELY.

BUTT moved to be allowed to sign judgment on a *sci. fa.* The writ was returnable on the 28th *April*, and various attempts had been made to summon the defendant. According to 1 *Reg. Gen. H. T. 2 Will. 4*, s. 81 (a), the plaintiff was entitled to sign judgment, eight days having expired since the return of one *sci. fa.*

Where several attempts were made to summon a defendant on a *sci. fa.*, returnable on the 28th *April*, and eight days had elapsed after the return of the writ; an application on the 5th *November* to sign judgment was held too late, without summoning the defendant again.

LITLEDAL, J.—You must either issue two writs of *sci. fa.* or summon the defendant. But you ought, in either case, to come within a reasonable time. You are now too late to obtain judgment on the writ you have issued, unless you summon the defendant again.

Rule refused.

(a) *Ante*, p. 194.

ANONYMOUS.

Nov. 16th.

HARRISON, in moving for a *distringas* under s. 3 of 2 *Will. 4*, c. 39 (b), produced an affidavit, which stated, that attempts had been made three several times to serve the defendant with the writ of summons, (specifying how the attempts were made, and that one was made by appointment of defendant's clerk); and the affidavit proceeded to state, in the words of the act, "that the defendant had not, according to the exigency of the writ, appeared to the action, and could not be compelled so to do, without some more efficacious process."

In order to get a *distringas* under the 2 *Will. 4*, c. 39, there must be three attempts to serve, and the summons left, or a positive affidavit that the defendant keeps out of the way to avoid being served.

PATTESON, J.—I think you should go on to state, that you believe the defendant keeps out of the way to avoid being served, or that a copy of the summons was left for the defendant.

(b) Sec 3 Dowl. Stat. 145.

1892.

ANONYMOUS.

It was stated by counsel, that in the *Exchequer* it had been held that a copy must be left, as well as that three attempts had been made.

PATTESON, J.—I cannot say that it will be absolutely necessary, in all cases, to serve the summons; but you ought, at least, to state your belief that the defendant keeps out of the way to avoid being served; upon adding that, you may have your rule.

Rule granted.

Nov. 20th.

JOHNSON'S Bail.

Where bail, having made the affidavit required by Rule 3, *T. T. 1 Will. 4*, justify after exception, although the plaintiff does not appear to oppose, the defendant is still entitled to the costs of the justification.

PLATT applied for the costs of the justification of bail. They had made the affidavit required by Rule 3, *T. T. 1 Will. 4 (a)*, and were excepted to by the plaintiff. The bail had now come up, but the plaintiff had not appeared to oppose them. They had accordingly justified.

LITTLEDALE, J.—You may have the costs notwithstanding the plaintiff does not appear.

Costs granted.

(a) *Ante*, p. 103.

Nov. 20th.

SMITH'S Bail.

Where a bail swears, under Rule 3, *T. T. 1 Will. 4*, "that he is not bail for any," without adding "other person," it is sufficient.

CHANNELL opposed bail, on the ground, that in the affidavit of sufficiency, made under Rule 3, *T. T. 1 Will. 4 (b)*, the bail stated, "that they were not bail for any," without stating "other person," or "in any other action." It would be impossible to assign perjury on such a statement. The bail, not having complied with the form annexed to the rule of *Trinity Term, 1 Will. 4*, must be rejected.

(b) *Ante*, p. 103.

LITTLEDALE, J.—I am not sure that you could not assign perjury on that statement. The words, “bail for any,” mean “bail for any other person.”

1832.
SMITH'S Bail.

Bail passed.

JACKSON v. ELAM.

Nov. 20th.

BARSTOW moved for judgment upon a *sci. fa.* issued by the plaintiff's executors to revive the judgment obtained in this cause. It did not appear that the defendant had been summoned or had received any notice of the proceeding. It was, however, contended, that the Rule 1 *H. T. 2 Will. 4*, s. 81 (a), did not apply to the case of a *sci. fa.* to revive a judgment. If s. 81 were taken in connection with s. 80, it would appear that the former only applied to proceedings against bail, the object of the rule being to give notice to them in order that they might have an opportunity of rendering their principal. But the reason of the rule did not apply to a case in which judgment had already been obtained against a defendant.

The rule 1
H. T. 2 Will. 4,
s. 81, as to *sci.*
fa., applies to
the case of both
principal and
bail.

LITTLEDALE, J. (after conferring with the Master)—The language of s. 81 is general, and the Courts never intended to limit its operation to proceedings against bail. There may be good reason why a plaintiff should not avail himself of an old judgment, without giving that notice in substance to the defendant, which the form of the proceeding indicates to be necessary.

Rule refused.

(a) *Ante*, p. 194.

1832.

Nov. 20th.

STORR and Another v. BOWLES.

[Before the Four Judges.]

The Uniformity of Process act, 2 Will. 4, c. 39, applies to the commencement of actions only, and not to the continuance of actions commenced before the act came into operation.

S. HUGHES made an application to the Court for an order upon the officer at the bill of *Middlesex* Office, directing him to sign a *pluries* bill of *Middlesex*. In *Easter* Term last, a bill of *Middlesex* had been issued against the defendant, which had been continued by *alias* and *pluries* to the first day of the present term. Another *pluries* bill of *Middlesex* having been tendered at the bill of *Middlesex* office for signature, the officer refused to sign it, alleging that he had received directions from Mr. Justice *Patteson* not to sign any writs but such as were issued under the new act.

PATTESON, J., said, that he had merely sent him a copy of the new rules.

S. Hughes.—These writs were issued to prevent the operation of the statute of limitations. The 1 & 2 Will. 4, c. 39, gave a new form of writ; but that act speaks of the commencement of actions only; and therefore a writ issued under the new act would not be a continuance of a bill of *Middlesex*, which was another species of writ. He therefore submitted that the Court should direct the officer to sign the writ as required.

PER CURIAM.—Upon looking at the act, it appears to be confined to the commencement of actions, and not to the continuance of them; the signer of the writs, therefore ought to have signed the bill of *Middlesex*, as prayed.

Application granted.

Hilary Term.

IN THE THIRD YEAR OF THE REIGN OF WILLIAM IV.

Ex parte SENIOR.

1833.

Jan. 11th.

W. H. WATSON applied to re-admit an attorney. The first day of *Michaelmas* Term was the 2nd *November*, and the 1st *November* was a holiday in the *King's Bench* office. He was, therefore, unable to stick up his notice in that office on the 1st *November*. On the 2nd *November*, however, he stuck it up at the opening of the office. There, it had remained throughout the term. All the other requisites stated in the rule of Court of *T. T. 33 Geo. 3*, had been complied with. He submitted, that sticking up the notice in the *King's Bench* office, as he had described, was a sufficient compliance with the rule in that particular. He cited *Ex parte Davey (a)*, where an attorney intending to apply to be re-admitted on the roll, affixed his notice outside the Court, in the morning, before the sitting of the Court on the first day of the term of which notice was intended to be given; the Court held that it was a sufficient compliance with the rule of *T. T. 33 Geo. 3*.

An attorney, intending to apply for re-admission, stuck up his notice in the *King's Bench* office at its opening, on the first day of the term of which his notice was intended to be given:—
Held, a sufficient compliance with the rule of *T. T. 33 Geo. 3*.

PARKE, J.—Let him be re-admitted.

Rule granted.

(a) 4 D. & R. 646.

1833.

Jan. 12th.

DOR *d.* JONES *v.* ROE.

If the tenant in possession reads over and says he understands the nature and object of a declaration in ejectment, it is not necessary for the person serving it to read it over or explain it.

DOWLING moved for judgment against the casual ejector. The peculiarity in the service was, that the person serving the declaration did not read it over or explain it; the tenant, however, read over the declaration, and said he understood the nature and object of it.

PARKE, J.—That will do.

Rule granted (a).

(a) See 2 Tidd. Prac. 1209, 9th edit.

Jan. 21st.

SHIPTON *v.* SHIPTON.

Where a warrant of attorney makes no mention of interest on the principal, but the defeasance does, the Court will allow execution to be issued for the principal and interest.

BALL moved for judgment on an old warrant of attorney. The difficulty in the case is as to the amount for which the judgment should be entered up. It was an action of debt on a bond for 1,600*l.*, to secure the payment of a sum of 800*l.*, and interest. The warrant of attorney was for 800*l.*, without mentioning the "interest." The defeasance stated, that the warrant was given to secure the payment of 800*l.*, "and interest." The defeasance, and the warrant of attorney, must be considered and taken as one instrument, and then the Court would look at the intention of the parties to them. That they must be considered as one instrument was clear, from one stamp only being necessary (a); and by rule 42 *Geo. 3* (b), the attorney was required to write the defeasance and warrant of attorney on the same paper. He also cited *Woolley* and *Another v. Jennings* (c).

(a) *Cawthorne v. Holben*, 1 N. R. 279.

(b) 2 East, 136.

(c) 5 B. & C. 165

PARKE, J.—You may sign judgment for 1,600*l.*, but issue execution for the 800*l.* and interest only.

1833.

SHIPTON
v.
SHIPTON.

Rule granted.

SMITH v. CRUMP.

Jan. 22nd.

J. L. ADOLPHUS shewed cause against a rule for setting aside a summons for irregularity. The alleged irregularity was, that the name of the plaintiff was not stated as the person who would enter an appearance for the defendant, if he did not comply with the exigency of the process. That was an immaterial omission, for it must be quite clear, from reading the summons, who would enter the appearance in case of the defendant's default, because the name of the plaintiff had appeared in the previous part of the summons as the person giving notice.

In a summons, if the name of the plaintiff is omitted as the person who will enter an appearance for the defendant, if he omit to enter one, it is an irregularity.

PARKE, J.—The omission is an irregularity. The statute provides the form in which the summons is to be drawn, and if parties will not take the trouble of looking at the act before they proceed, they must take the consequences. If we once enter into the question as to what is material or what is immaterial in the process, we shall have innumerable questions of that sort coming before the Court. The best way is to make parties remember the course they ought to pursue by setting aside their proceedings for not doing what they ought.

J. L. Adolphus then pointed out a fatal defect in the jurat of the affidavit on which the rule had been obtained; on which it was—

Discharged, with costs.

1833.

Jan. 23rd.

The KING *v.* Lady BRISCOE.

The 1 *Will.* 4, c. 22, s. 4, which gives power to the Court to issue commissions in certain cases for the examination of witnesses, does not apply to indictments.

CURWOOD moved for a rule to shew cause why a commission under the 1 *Will.* 4, c. 22, s. 4 (a), should not issue to examine witnesses in *France* on an indictment against the defendant for perjury. The words of the section were "in every action;" but, in the present case, his application referred to an indictment. As, however, the act was a remedial one, the Court might be disposed to extend its provisions to such a case as the present.

PARKE, J.—This is not an action. The distinction between an action and an indictment is clear. The statute only applies to actions, and therefore the present application cannot be granted.

Rule refused.

(a) See 2 Dowl. Stat. 43.

Jan. 23rd.

MORLAND, Bart., and Others *v.* CHITTY and Cox.

Where the sheriff applies to the Court for relief under the 1 & 2 *Will.* 4, c. 58, s. 6, the Interpleader Act, and no blame appears to attach either to the execution-creditor, the claimant, or the sheriff, each party will pay his own costs.

DODD had obtained in this case a rule on the part of the sheriff of *Glamorganshire*, under the Interpleader Act, the 1 & 2 *Will.* 4, c. 58, s. 6 (a), calling on the plaintiffs and Mr. *Farquhar Fraser*, a party claiming mining machinery and goods seized under a *fi. fa.* issued in the cause, to appear before the Court, in order that such relief as the Court should think fit might be afforded to the sheriff. Mr. *Fraser* claimed the machinery and goods seized under a mortgage from *Cox*, the defendant, for 24,000*l.*, and served notice on the sheriff not to sell. The parties ap-

(a) 2 Dowl. Stat. 571.

peared before the Court by counsel, and an order was then made referring the case to the Master, in order that he might decide whether the goods legally belonged to Mr. *Fraser* or not, the question of costs being reserved for the consideration of the Court. The Master having heard the case, reported that the goods belonged to Mr. *Fraser*, and were, consequently, not liable to the execution.

1833.
MORLAND
v.
CHITTY.

Vaughan Williams moved that Mr. *Fraser*, the mortgagee, should be allowed his costs on the proceedings before the Master. As his goods had been illegally seized, he ought not to be compelled to incur costs in procuring their restoration. Either the plaintiffs or the sheriff ought to pay him his costs.

Dodd, for the sheriff, contended, that as the sheriff was bound to seize in obedience to the *fi. fa.*, and as he could not know at the time he seized that the goods belonged to Mr. *Fraser*, it would be contrary to the spirit of the act if he were compelled to pay those costs.

PARKE, J.—The sheriff ought not to pay the costs; and as no blame appears to be attached to the plaintiffs, I do not think that they ought to pay them either.

Rule discharged, each party paying his own costs.

1833.

Jan. 23rd.

DUKES v. SAUNDERS.

Where a party gives a warrant of attorney to another, without consideration, in order that the latter may protect the goods of the former from execution, and judgment and execution are signed and issued against good faith, a Court of law will not interfere.

BUSBY moved for a rule to shew cause why the warrant of attorney given in this case should not be cancelled, and the judgment signed and execution issued thereon should not be set aside with costs. The defendant executed the warrant of attorney in favour of the plaintiff, and the defendant stated that it was given to him to secure a debt of 500*l.*, without stating what the debt was. The facts were, that the defendant, who was a son-in-law of the plaintiff, being in difficulties and expecting executions to be issued against him, gave the warrant of attorney in question to his father-in-law, in order to protect his goods. No debt was in fact due from the defendant to the plaintiff, as was distinctly sworn. The plaintiff, however, signed judgment, and a levy was made upon the goods of the defendant. The present application was, therefore, made to set aside the judgment and execution, on the ground that no debt was due, and that the plaintiff had abused the authority vested in him under the arrangement before mentioned.

PARKE, J.—The Court cannot grant this application; the plaintiff was the trustee of the defendant, and we cannot interfere between the trustee and his *cestui que trust*. The defendant must seek his remedy in equity. This warrant of attorney is good as between the parties, though it might be void as against creditors.

Rule refused.

1833.

DAY v. WALDOCK.

LAWRENCE v. SAME.

Jan. 23rd.

IN this case the sheriff applied to the Court for relief under the 1 & 2 Will. 4, c. 58, s. 6 (a). The plaintiff *Day* delivered a *fi. fa.* to the sheriff on the 24th June, 1832. At the time of delivering the writ he requested the sheriff not to issue his warrant immediately; but on the 1st August he desired that the warrant should issue. On the 3rd August, the plaintiff *Lawrence* delivered a *fi. fa.* to the same sheriff, under which, on the 4th, the defendant's goods were seized. In half an hour after the seizure, the warrant on the plaintiff *Day's* writ was delivered to the officer. *Day* contended, that, as his writ had been first issued, he had a right to receive the proceeds of the seizure. *Lawrence* contended, that there was fraud on the part of *Day*, and, therefore, that the proceeds of the seizure ought to be paid to him. Under these circumstances the sheriff applied to the Court for relief.

Where a sheriff seizes under one *fi. fa.*, and the question is, whether that writ ought to have precedence of another, the Court will not grant the sheriff relief under the 1 & 2 Will. 4, c. 58, s. 6.

PARKE, J.—It does not appear to me that this is a case within the statute. This is a mere struggle for precedence between two execution-creditors.

Rule discharged (b).

(a) 2 Dowl. Stat. 571.

(b) See *Salmon v. James*, ante, p. 369.

1833.

Jan. 23rd.

FORTESCUE *v.* JONES.

Where a rule *nisi* is obtained for setting aside proceedings for irregularity, there can be no stay of proceedings, unless notice of the motion has been given to the opposite party.

MAULE, having obtained a rule *nisi* for setting aside proceedings for irregularity, moved that the rule might be granted with a stay of proceedings in the meantime.

PARKE, J.—Have you given notice to the other side?

Maule.—We have not.

PARKE, J.—Then you cannot have your rule, with a stay of proceedings.

Rule *nisi* granted, without a stay of proceedings.



Jan. 23rd.

MORRIS *v.* GARDNER.

If money is improperly in the hands of a proctor, the Consistory Court may order him to refund it.

BUSBY applied for a prohibition to restrain the Consistory Court of *Gloucester* from proceeding upon a sentence pronounced by the Judge of that Court against the defendant *Gardner*, so far as that sentence related to a sum of 61*l.*, thereby directed to be paid by him to the plaintiff. Previous to the year 1829, the defendant for many years held the office of deputy registrar of the diocese, and that office he resigned in that year. He had also during that time been, and at the time of the suit in question was, a proctor of the Court. In 1827, the plaintiff and a person of the name of *Wintle* attended as the executors of one *Jonathan Wintle*, at the defendant's office, to prove the will of the testator. The defendant granted a probate as deputy registrar, and received from *Wintle*, the co-executor, the sum of 61*l.* for probate duty and his charges as deputy-

registrar and proctor. In 1832, and after the death of *Wintle*, the co-executor, the plaintiff, instituted the present suit in the Consistory Court, alleging that neither he nor *Wintle* had ever received probate from the defendant's office, and therefore prayed that a fresh probate might be granted to him as the surviving executor, and, generally, that justice might be done in the premises. He also alleged that the defendant had forged the name of the superior or principal registrar. The suit being of a criminal nature, the defendant appeared in Court at its several stages, and protested against the proceeding, on the ground that it ought to have been commenced by articles instead of allegation. He took no measure to defend the suit, except that he tendered an affidavit made by a person who had been his clerk at the time of the original probate being granted, which stated, that soon after the granting of the probate he had delivered it out according to his custom, to a person who claimed it. This affidavit the Judge refused to receive, and pronounced sentence that the probate should be granted as prayed, and, amongst other things, that the defendant should refund to the plaintiff in the suit the sum of 61*l*. The plaintiff threatened to carry the sentence into effect, and the present application was, therefore, made for a prohibition to restrain the Court, so far as the enforcement of the demand of 61*l*. was concerned. *Busby* contended, that this sum was either a fine, or debt, or damages. If it was a fine, a Court not of record had no power to fine. If it was a debt or damages the Court could not order it to be paid, because that power only belonged to a Court in which an action could be brought for its recovery, and such a Court only interfered by making such an order for the sake of preventing circuitry of proceeding. But as the Consistory Court had no power to entertain an action, it had no power to make such an order. It had been long settled, that neither a

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proctor nor apparitor could maintain an action for his fees in the Consistory Court.

Cur. adv. vult.

PARKE, J.—I can find nothing to shew that the Consistory Court has no power to order one of its officers to pay over a sum of money which has come into his hands, without giving adequate consideration for it. In the absence of such an authority, and it being reasonable that such a power should be exercised, the rule prayed cannot be granted.

Rule refused.



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JOHNSON v. SMEALEY.

Where the sheriff has distrained on a defendant's goods under the 2 & 3 Will. 4, c. 39, s. 3, and the defendant does not appear according to the exigency of the writ, the plaintiff may enter an appearance for him without leave of the Court.

COOPER moved to be allowed to enter an appearance for the defendant under the 2 & 3 Will. 4, c. 39, s. 3 (a). A *distringas* had been issued, and a levy made under it. The question was, whether, under these circumstances, the plaintiff could enter an appearance for the defendant, without the leave of the Court: in the form to which s. 3 referred, the notice was to the defendant, that in default of his appearance within eight days inclusive, after the return of the *distringas*, the plaintiff would enter an appearance for him. That applied to cases like the present, in which a levy had been made. From the form, it should appear, therefore, that in such cases it was not necessary for the plaintiff to obtain the leave of the Court to authorize the entering of an appearance for the defendant.

PARKE, J.—If the parties' goods are not distrained, and

(a) 3 Dowl. Statutes, 145.

the sheriff returns *non est inventus* and *nulla bona*, it is necessary, according to the act, that the leave of the Court should be obtained before the plaintiff enters an appearance for the defendant. But where the goods of the defendant are distrained, then, according to the form attached to sect. 3, the plaintiff may enter an appearance for the defendant, without the leave of the Court. That form is recognised as law by sect. 16. The appearance may therefore be entered.

Application granted.

REX v. The Inhabitants of LUXBOROUGH.

Jan. 23rd.

FOLLETT moved, on the part of the defendants, who were the inhabitants of the parish of *Luxborough*, to be allowed to plead guilty to an indictment for the non-repair of a road. After the indictment had been found, one of the inhabitants appeared at the Sessions, and objected to the parish pleading guilty to it. That inhabitant had since removed the indictment by *certiorari* into the *King's Bench*. As the inhabitants were not disposed to incur any expenses of defending an indictment when they were disposed to plead guilty to it, they now applied to be permitted so to plead.

Where one inhabitant of a parish has removed an indictment against it, for the non-repair of a road, into the *King's Bench*, and has given the usual security for costs, in case a verdict of guilty should pass, the other inhabitants of the parish will not be permitted to plead guilty to the indictment.

PARKE, J. (having learned from the Master of the Crown Office that the inhabitant in question had entered into the usual recognizances to pay the costs of defending the indictment, if a verdict of guilty should be found).—The inhabitants cannot be permitted to plead guilty to this indictment now that these recognizances have been entered into. They will be in no worse situation in consequence of not being allowed so to plead, since, if a verdict of guilty should pass, the person who has entered into the recognizances will be alone liable for the costs.

Rule refused.

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SEAWARD v. WILLIAMS.

Where a sheriff is relieved under the 1 & 2 Will. 4, c. 56, s. 6, and an issue is directed to try the rights of adverse claimants, the Court may adjudicate after the trial on the costs of appearing to the sheriff's rule and of the issue.

J. JERVIS shewed cause against a rule for the revival of the original rule in this cause, and the payment by the defendant to the plaintiff of the costs of the original application to the Court in this cause, and also of the issue which had been tried. The defendant had issued an execution against the goods of a third person, of whom the plaintiff was a creditor. The goods in the possession of the third person were claimed by the plaintiff under a bill of sale. The sheriff applied to the Court for relief under s. 6 of the Interpleader Act, the 1 & 2 Will. 4, c. 58 (a). An issue was accordingly directed to be tried between the plaintiff and the defendant, and the plaintiff succeeded. The object of the present application was, that the plaintiff might obtain the costs to which he was put by appearing to the sheriff's rule, and on the trial of the issue. The Court, however, had no power to entertain such an application, as it had done all that the act authorized it to do on disposing of the sheriff's rule. The Court was in fact *functus officio*.

Lloyd appeared in support of the rule.

PARKE, J.—The Court has clearly power to grant such an application as the present, if it sees right so to do. If it had not such a power the act would be useless. It was the fault of the defendant that the sheriff's rule and the issue were necessary. Therefore, the defendant ought to pay the costs of the plaintiff's appearing on the sheriff's rule and of trying the issue.

Rule absolute.

(a) See 2 Dowl. Stat. 571.

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CARTWRIGHT, Administrator; v. COOK.

Jan. 24th.

BLACKBURN shewed cause against a rule obtained by *Knowles*, for reviewing the Master's taxation. The action was brought by *Cartwright*, as administrator, to recover money which he had been obliged to pay after the death of the intestate, and therefore declared for money paid to the use of the defendant. The money became due as the arrears of an annuity, of which the intestate was the surety, and the defendant the principal. The defendant pleaded two pleas—*First*, the general issue—and, *Secondly*, a set-off for money advanced to the intestate in his lifetime. A verdict was found for the plaintiff subject to a special case. Upon the argument the counsel for the defendant began by urging the point as to the set-off; but the Court intimated that it could not be supported, as the claim and the set-off were not in the same right. The counsel then proceeded to the general issue, and upon that succeeded, on account of an agreement by which the Court thought the intestate had agreed to take upon himself the payment of the annuity. A nonsuit was therefore directed to be entered. The Master on taxation allowed the expenses of the witnesses for the defendant to prove the set-off. The present motion had been made to review the Master's taxation, on the ground that those expenses ought to have been disallowed, as the plea of set-off could not be supported. But if the plaintiff had thought proper to demur, those expenses would not have been incurred, as the cause would not then have gone down to trial. As he had not demurred, and consequently the defendant was put to those expenses, the plaintiff ought to pay them.

Where, after verdict for the plaintiff, subject to a special case, one of the defendant's pleas is held bad, he is not entitled to the costs of witnesses in support of that plea.

Knowles, contra, contended, that, as the plea of set-off had been determined to be a bad plea, the costs ought to

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have been taxed as if that issue had been found for the plaintiff; and, therefore, that the plaintiff ought not to pay the expenses of the defendant's witnesses.

PARKE, J.—If the plaintiff had demurred, he would have been entitled to the costs of the demurrer. As it was clear the plea could not be supported, it is not just that the plaintiff should have to pay the costs of the witnesses in support of that plea.

Rule absolute for reviewing the Master's taxation.



Jan. 25th.

REX v. LEWIS LEWIS.

Where a surveyor of the highways has improperly allowed the time for producing and passing his accounts to elapse, the Court will compel him to produce them by *mandamus*.

AT a special Sessions for the highways, held *October 29th, 1828*, *Lewis Lewis* was duly appointed surveyor of the highways for the hamlet of *Penmain*, in the county of *Monmouth*, for the year ensuing, and he accepted the office; but, instead of performing the duties thereof personally, he agreed with one *Daniel Lewis*, that he should perform the duties of the office for him. This agreement was without the consent or approbation either of the inhabitants of the hamlet, or of the justices; and *Daniel Lewis* was not appointed assistant surveyor. *Daniel Lewis* accordingly acted throughout the year for *Lewis Lewis*; and, at a meeting held for the hamlet, on the *16th October, 1829*, he produced certain accounts, as for the accounts of *Lewis Lewis*, which accounts were passed by the inhabitants at the meeting, but were never taken before one justice, pursuant to the statute; although, on the *29th* of the same month, they were produced and verified on oath by *Daniel Lewis*, at a special Sessions for the

highways, and then allowed; which allowance was afterwards removed by *certiorari*, and quashed in the *King's Bench*. *Lewis Lewis* had never rendered or produced any account whatever. A large sum of money had been received by *Daniel Lewis* over and above what had been expended on the highways; and part of this sum had been paid over. In consequence of its being discovered that *Daniel Lewis* had fraudulently converted to his own use the said sum of money, he was indicted for embezzling it, being charged as clerk or servant of *Lewis Lewis*. Owing to various delays the indictment was not tried till the *Michaelmas* Sessions, 1832, when he was acquitted, the Sessions holding the offence did not amount to felony, within 7 & 8 *Geo. 4*, c. 29. The application would have been made earlier but for the pendency of the indictment. *Lewis Lewis* now refused to produce and pass his accounts, on the ground that the time for so doing was passed.

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Greaves moved, on affidavit to these facts, for a rule *nisi* for a *mandamus* to compel *Lewis Lewis* to produce and pass his accounts; which was granted by *Parke, J.*, and was afterwards made absolute, no cause being shewn (a).

(a) See *Rex v. Justices of Denbighshire*, 4 East, 142; *Rex v. Sparrow*, 2 Strange, 1123, 1 Bott, S. C.; *Rex v. Mayor of Norwich*, 1 B. & Ad. 310.

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Jan. 25th.

A warrant of attorney given to secure the payment of future costs, and also of costs and money already due and advanced, though void as to the client's future liability, is valid as to his actual liability.

HOLDSWORTH and Others v. WAKEMAN.

IN this case a rule *nisi* was obtained for setting aside a warrant of attorney, and the judgment and execution signed and issued on it. The motion was founded on affidavits, which alleged impropriety in the mode of obtaining the warrant of attorney; but which were fully answered. It appeared, however, that the warrant of attorney had been given by the defendant to secure the payment of bills of costs to become due, as well as of bills of costs already due, and advances of money already made.

R. V. Richards shewed cause, and contended, that, although the warrant of attorney might be void so far as future bills of costs were concerned, it was not void as to the bills already due, and the sums already advanced. The plaintiffs were therefore at liberty to issue execution for the amount of the latter bills and advances.

Thesiger and *White* supported the rule, and cited *Jones and Another v. Hunter and Another* (a).

PARKE, J.—In that case the warrant of attorney appears from the report to have been given for the purpose of securing the payment of future bills only. But here it was given also to secure the payment of costs already due, and advances already made. It does not appear to me that the warrant of attorney is void altogether, but that it is void only as to that part which was to become due. The Court will exercise an equitable jurisdiction, in order to prevent the client from being forced to give security for future costs; but we cannot go so far as to make void the security for that to which the client is pro-

(a) *Ante*, p. 462.

perly liable. Let the warrant of attorney therefore stand as a security for the costs due and money advanced up to the time of its being given.

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Rule discharged, without costs.

RICHARDS v. COHEN.

Jan. 25th.

THIS was an action for libel. The declaration contained three counts. The pleas were—*First*, not guilty to the whole—and, *Secondly*, several justifications, to some of which there were replications and issues thereon, and to the others demurrers and joinders. The trial took place before the demurrers were argued, and a verdict was found for the plaintiff generally—Damages, One Farthing. A summons was afterwards taken out, calling on the plaintiff to shew cause why the verdict found for him should not be entered on the first count only, and for the defendant on the second and third counts. The summons was heard before Lord *Lyndhurst*, and, after time taken to consider, he made an order. Afterwards, a summons was taken out, calling on the defendant to shew cause why the plaintiff should not be at liberty to elect on which count he would take his verdict. He elected to have it on the third count, and the verdict was accordingly entered for the plaintiff on the third count, and for the defendant on the first and second counts. The demurrers were only applicable to some of the pleas to the first and second counts, which were found for the defendant. It was agreed between the attornies that no argument should take place. All the plaintiff's witnesses were necessary in support of the count found for him; and all the defendant's witnesses were as necessary in support of the pleas to the count found

Where a plaintiff succeeds on one of several issues, and the defendant succeeds on the others, but the defendant's witnesses are as necessary on the issues found against him as on the issues found for him, the plaintiff will be entitled to the costs of all his witnesses upon the issues found for him, and the defendant to none of his.

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against him, as in support of those to the counts found for him. On taxation, the Master allowed the plaintiff the general costs of the cause, as applicable to the third count only, including all his witnesses; and to the defendant the costs of the pleadings only in respect of the first and second counts. He allowed no costs of the demurrers to either party, the argument having been mutually abandoned. He allowed the costs of the summonses to amend the entering of the verdict and consequent thereupon.

White moved for a rule *nisi* to review the Master's taxation, on the grounds—*First*, that the costs of the summonses ought not to have been allowed against the defendant—and, *Secondly*, that the Master had not allowed the defendant sufficient costs. On the first point, he submitted that the defendant was rather entitled, than liable, to the costs of the summonses. He succeeded on the first summons, and the second became necessary in consequence of the plaintiff not having claimed his election when he attended the first. On the second he referred to 1 *Reg. Gen. H. T. 2 Will. 4*, s. 74 (a)—“No costs shall be allowed on taxation to a plaintiff upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs:” and contended, that, as the defendant had succeeded on two out of the three issues, he was entitled to two thirds of the expenses of his witnesses, in addition to the costs of the pleadings already allowed him. He also contended, that, as the plaintiff had abandoned his demurrers to the defendant's pleas, the defendant was entitled to the costs of those demurrers.

Thesiger appeared, in the first instance, to oppose the application, and contended, that, as all the witnesses on the

(a) *Ante*, p. 193.

part of the defendant were as necessary to him in support of his case on the third count, which was found for the plaintiff, as they were on the first and second counts, they must on taxation be wholly considered as witnesses on an issue on which the plaintiff had succeeded; and, therefore, the defendant not having succeeded, he was not entitled to the costs of those witnesses. The costs of all the witnesses being disposed of, nothing remained to be considered on taxation but the pleadings of the issues on which the defendant had succeeded, and these the Master had allowed him. As to the costs of the demurrers, it having been mutually agreed that no argument should take place upon them, neither party could be entitled to any costs. With respect to the costs of the summonses, as they were incurred in enforcing the plaintiff's right, he was entitled to them.

PARKE, J.—I think the defendant ought not to be charged with the costs of the summonses. If the first and second counts had been struck out, the defendant would have been in no worse situation on the facts of the case than he is now; because his witnesses were necessary on the third count. On that count the plaintiff has succeeded, and therefore the defendant cannot be entitled to any costs. He has been allowed the costs of the pleadings of the issues found for him. As to the demurrers, it appears that by mutual consent they were not argued; and, therefore, neither party was entitled to costs.

Rule absolute for deducting the costs of the summonses, and refused as to the rest.

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REX v. WILKINS and Others.

The Court will not allow a party to prosecute in the *King's Bench in formâ pauperis* on the common affidavit of poverty: but special grounds must be laid for such an application.

ADOLPHUS moved, on the part of the prosecutor, that he might be admitted to prosecute *in formâ pauperis*. It was an indictment for perjury against the defendant. He had been deprived, by conspiracy, of the benefit of various legacies to which he was entitled under his father's will, and, in order to enforce his claims to them, he had instituted a suit in *Chancery, in formâ pauperis*. The affidavits on which he moved stated various circumstances, which shewed that the present was a case of peculiar hardship, and that the applicant was in great distress.

PARKE, J.—It appears from the case of *Rex v. Clarke and Another (a)*, that the mere affidavit of poverty on the part of the prosecutor is not sufficient to entitle him to prosecute *in formâ pauperis*. There must be some special circumstances in the case to authorize the Court to grant such an application.

Cur. adv. vult.

Jan. 31st.

PARKE, J.—I have considered this case a good deal, and have communicated with the other Judges on the subject; and we were desirous of assisting the prosecutor in this case as far as we could. But there are two reasons which prevent the Court from granting the application. One is, that the applicant is a volunteer, and is not forced into this Court; for he has himself preferred his bill in the *King's Bench*, when he might have preferred it at the Quarter Sessions. Secondly, it does not appear from his affidavit whether the suits in equity are yet determined. We cannot help thinking that this prosecution is intended to assist the proceedings in equity.

Rule refused.

(a) 3 Burr. 1308.

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Jan. 28th.

KELLY *v.* DICKINSON and Another.

V. RICHARDS applied to discharge the defendant, *Esther Dickinson*, out of custody, under the 48 *Geo. 3*, c. 123, she having remained in execution twelve months for a debt not exceeding 20*l.*

On applying to discharge a prisoner under the 48 *Geo. 3*, c. 123, the name of the cause stated in the notice must correspond with the name of that in which he is in execution.

Ball appeared, on the part of the plaintiff, to oppose the discharge. The notice which had been served on the plaintiff did not state the name of the cause in which the defendant was in execution at the suit of the plaintiff. The name of the cause was "*John Kelly v. James Dickinson and Esther Bellamy, otherwise called Esther Dickinson.*" The notice was in the case of "*John Kelly v. James Dickinson and Esther Bellamy, sued as Esther Dickinson.*"

PARKE, J.—But you are now too late to object to the form of the notice, as you appear on the notice.

Ball.—The plaintiff has received a notice in a cause in which he appears to be a party, and therefore he comes to the Court to hear what is to be alleged against him.

PARKE, J.—Perhaps it is not a waiver. The notice should correspond with the name of the cause in which the defendant is in execution. If I granted the rule the marshal would not discharge the defendant, as it would be drawn up in the name of the cause in which the notice had been given, and that would not correspond with the entry in the marshal's book of the name of the cause in which the defendant is in execution. The rule, therefore, cannot be granted.

Rule refused.

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Jan. 29th.

The KING *v.* MAFFEY, in the cause of MAFFEY *v.* GOODWIN.*(Before the four Judges).*

The Court will not grant an attachment for the non-payment of costs payable under an award, at the instance of the personal representative of a deceased party, to which party they were to have been paid.

ERLE shewed cause against a rule obtained by *Barstow* for an attachment against the plaintiff for non-payment of the defendant's costs in the cause. A Judge's order for the reference of the matters in difference in the cause had been made, and the arbitrator had found that the plaintiff had no cause of action. This order was made a rule of Court in the term after the making of the award. A few days after the term the defendant died. After his death the costs of the cause were taxed, and the rule *nisi* for an attachment against the plaintiff for the non-payment of those costs was obtained on the part of the defendant's administratrix. He contended that the present rule for an attachment could not be made absolute. The power of the Court to grant an attachment could only exist in the case of its suitors. Here, however, the defendant being dead, the cause had ceased to exist, and, therefore, the power of the Court to grant an attachment had ceased also. He was aware of the case of *Rogers v. Stanton* (a). But that case, he submitted, would not now be regarded as law.

Barstow, contrà, submitted, that the case of *Rogers v. Stanton* was perfectly in point; and there was no reason for the suggestion made, that the Court ought not to be guided by it. The circumstances in that case were not so strong as those in the present. It did not appear there that the defendant was alive an entire term after the award had been made, or that the submission had been made a rule of Court in his lifetime. As to the argument that the suit had abated, it might be that the suit had abated

(a) 7 Taunt. 576.

for the purpose of establishing a right or imposing a liability not previously existing, but not for giving effect to previous rights or enforcing previous liabilities. He submitted, therefore, that the present rule must be made absolute.

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Per Curiam.—We are of opinion that the only remedy of the defendant is by action. The suit having abated, the Court cannot grant an attachment.

Rule discharged.

The KING v. The Justices of Essex.

Jan. 30th.

JEREMY shewed cause against a rule obtained by *Mirehouse* for a *mandamus* to be directed to the Justices of *Essex*, commanding them to enter continuances and hear an appeal against a poor rate. The appellant had entered his appeal at the *Epiphany* Sessions, 1833. Being advised that he had not then sufficient materials safely to prosecute his appeal, he gave notice to the respondents the day previous to the day of hearing appeals, that he should not proceed in it; and, when it was called on, he did not appear to support it. The respondents then prayed that the Sessions would receive evidence of the due making and publishing the rate, in order that the rate might be confirmed, and an order made for their costs. The Sessions conceiving they had no jurisdiction, the appellant not appearing to support his appeal, refused to go into the subject, or make any order for costs. They were not unwilling to hear it, but they did not conceive that they had power so to do. If the Sessions made the order, the appellant was willing to pay the costs, but he could not without such an order.

Where an appeal against a poor rate is entered, and the appellant does not appear to support his appeal, the Session still have power to hear the appeal, and make an order for the respondents' costs upon the appellant.

Mirehouse appeared to support the rule, and prayed also for the costs of the motion.

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 ESSEX.

PARKE, J.—The Sessions were wrong in supposing they had no jurisdiction in such a case. It is clear they had, from the cases of *Rex v. Justices of Essex (a)*, *Rex v. Inhabitants of Cawston (b)*, and *Ex parte Holloway (c)*. As it is evident the only object of this *mandamus* is to compel the payment of costs by the appellant, the best course will be, that he shall pay the costs of the appeal to the respondents, to be taxed by the Clerk of the Peace, and this rule be discharged. Each party will pay his own costs of this application.

Rule discharged, the appellant undertaking to pay the respondents their costs.

(a) 8 T. R. 583.

(b) 4 D. & R. 445.

(c) *Ante*, p. 26.

Jan. 30th.

In re ST. GILES and ST. GEORGE'S Parishes.

Where a local statute confers a power of investigating accounts upon auditors to be annually elected, and to be summoned by the vestry clerk, at certain stated intervals, to audit the accounts, the Court will not grant a *mandamus* to compel the latter, when new auditors have been elected for the succeeding year, to call a meeting of the old auditors to audit the accounts of the past year.

PETERSDORFF moved for a writ of *mandamus*, to be directed to the vestry clerk of *St. Giles in the Fields* and *St. George, Bloomsbury*, commanding him to lay before the auditors of those parishes, elected on the 17th *January*, 1832, the accounts of the vestry for the quarter ending at *Christmas*, 1832. The affairs of the two parishes are regulated by a local act, the 11 *Geo.* 4, c. x.; and so far as relates to the relief and maintenance of the poor, the parishes are united. By sections 7 & 8 of the statute, forty-five persons are appointed vestrymen of the parish of *St. Giles in the Fields*, and forty-five persons are appointed vestrymen of the parish of *St. George, Bloomsbury*, to continue in office until the *Tuesday* next before the 20th *January*, 1831, and until other vestrymen should be elected in their stead, in pursuance of the directions of the act. By s. 10 it is declared, that one half at the least

of the persons to be elected vestrymen shall be rated towards the relief of the poor at not less than 75*l. per annum*, and the remainder at not less than 50*l. per annum*; and that not more than one half of the persons to be elected vestrymen at any election shall be persons engaged in retail trade within the parishes. By s. 12 it is provided, that fourteen vestrymen for each parish shall go out of office annually, and that their successors shall be elected for three years: but every vestryman going out of office may be re-elected. By s. 15 it is enacted, that no person shall be entitled to vote for vestrymen, unless rated at 25*l. per annum* towards the relief of the poor. By s. 39, the inhabitants of each parish qualified to vote for vestrymen are, at the meetings for electing vestrymen, to elect six persons, not vestrymen, three at the least of whom shall be rated at 75*l. per annum*, and the remainder at not less than 50*l.*, to be auditors of the accounts of the vestrymen for each parish; and such auditors shall continue in office for one year. By s. 42, the vestrymen of the two parishes are constituted and declared the vestrymen of the joint vestry of the said parishes. The 64th section regulates the auditing of the accounts of the joint vestry, and the time and mode of appealing.—“And be it further enacted, that the auditors for the time being of the parish of *St. Giles in the Fields*, and the auditors for the time being of the parish of *St. George, Bloomsbury*, shall be, and they are hereby constituted, the auditors of the accounts of the vestrymen of the said joint vestry; and all such auditors shall be summoned by the vestry clerk of the said joint vestry, to meet together at some convenient place within the said parishes, within twenty-eight days after each quarter day in each and every year, to examine the accounts of all money raised and expended on account of any rate or rates made and levied for the relief of the poor, and of all other money raised and expended by the vestrymen of the said joint vestry and directors of the poor, in relation to the said parishes, under the authority

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of this act; and at every such meeting of auditors as aforesaid, which meeting the said auditors are hereby empowered to adjourn from time to time, all accounts of such money for the quarter preceding such meeting, together with the proper vouchers for the several items charged in the said accounts, shall be submitted to the auditors present at such meeting, who shall examine into and audit the same; and when and so soon as any such account shall have been examined into and allowed by such auditors, or by the majority of them present at such meeting, the same shall be stated in writing, and the allowance and date of such allowance of such auditors shall be signified by some memorandum, in writing, upon such account, signed by such auditors, or by seven of them; and every such account so allowed and signed shall be left in the hands of the vestry clerk of the said parishes for the inspection of all persons interested therein; and the said auditors may order the said account, or any part thereof, to be printed for the information of all such persons interested therein as may apply for the same. Provided always, that the expense of printing such accounts as aforesaid shall be paid out of the monies to be received by the vestrymen of the said joint vestry under this act. Provided also, that, in case the major part of the auditors present at any such meeting shall think that any money has been paid for any purposes to which no part of such money ought to be applied, such auditors shall specify upon such account every such sum as to them shall appear to be so improperly charged, and the grounds of their objection to such sum; and the said auditors are hereby required to signify their having examined the said accounts, and to specify the date of their examination." It appeared from the affidavits in support of the motion, that the accounts for the quarter ending *Christmas*, 1831, were, on the 12th *January*, 1832, laid before the auditors who were appointed in *January*, 1831, and by them, at one meeting only, were

examined and allowed. The accounts for the quarters ending *Lady-day*, *Midsummer*, and *Michaelmas*, were examined by the auditors appointed in *January*, 1832; and they having, in the course of their investigations, discovered very serious defalcations and frauds in the accounts, disallowed several sums, and particularized the objectionable items in their report to the vestry. The auditors having discovered that the vestry were resolved not to submit any further accounts to their scrutiny, summoned the vestry clerk to lay before them the accounts for the quarter ending *Christmas* last, which summons he disobeyed, and summoned the new auditors, who were appointed at the annual election on the 15th *January*, 1833, for the examination of their accounts. The auditors for the year 1832 had thus only three quarters laid before them, and were desirous of prosecuting their investigation for the remaining quarter. Now, the auditors being elected at one and the same period as the aliquot portion of the vestrymen, and as in aggregate bodies the admission of new members of the vestry is equivalent to the making a complete new assembly, it was clearly the intention of the legislature that the auditors for the year should supervise the accounts of the vestry for the same year, and for the whole of that period. The contemporaneous creation and termination of their duties obviously shew that the power of expending the parochial funds was to be in one body, and the authority to allow or disallow items in the other. If a different rule obtained, it might happen that auditors the least adapted to the duty might have to superintend the accounts of the old vestry; and it would always be in the power of the vestry clerk to decide before which class of auditors the accounts should be brought for examination. The office of the auditors had terminated on the appointment of new auditors, but the obligations and authority attached to their appointment had not ceased.

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PARKE, J.—According to the language of the act, the vestry clerk had the power of summoning the new auditors; but I will consult the Judges.

Cur. adv. vult.

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PARKE, J.—I have spoken to the other Judges, and they concur with me in the opinion that the accounts should be laid before the vestry auditors for the time being, and not before those who are out of office, and who have investigated the three previous quarters only.

Rule refused.

Jan. 30th.

MANVILL v. MANVILL.

Where a warrant of attorney only authorizes judgment to be entered up at the suit of the plaintiff, without mentioning executors, administrators, &c., the Court will not allow judgment to be entered up at the suit of the plaintiff's executor, although such representatives are mentioned in the defeasance.

V. LEE applied on behalf of the executrix of the plaintiff to enter up judgment on an old warrant of attorney. The warrant of attorney was directed to the plaintiff only, but the defeasance stated that the warrant of attorney was given to secure the payment of 712*l.* to the plaintiff, his "executors, administrators, and assigns."

PARKE, J.—It may perhaps have been the intention of the parties that the power to enter up judgment should be given to the "executors, administrators, and assigns," but the only person mentioned in the warrant of attorney is the plaintiff himself. This does not necessarily authorize his "executors, administrators, and assigns" to enter up judgment. These authorities must be strictly pursued.

Rule refused (a).

(a) See *Henshall (Executrix) v. Matthew*, ante, p. 217.

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Jan. 31st.

SMITH v. WILSON.

HOLT shewed cause against a rule *nisi* for setting aside a judgment, on the ground that it had been signed by an uncertificated attorney. He contended that the fact of the attorney not having taken out his certificate could not render the judgment irregular, although by so practising he might be liable to penalties.

The fact of a judgment being signed by an uncertificated attorney does not make it irregular.

PARKE, J.—He is an attorney of the Court, and if he has practised without his certificate, that will render him liable to certain penalties. That does not make the judgment irregular.

Rule discharged, with costs (a).

(a) See ——— v. Sexton, *ante*, p. 180.

BUILD and Another v. WIGHTMAN.

Jan. 31st.

CHANNEL moved to enter up judgment on an old warrant of attorney at the suit of the two plaintiffs. The warrant had been given to the two plaintiffs and another person, now deceased, to secure a joint debt due to all three as partners. The only difficulty which could arise in the case was, whether the warrant of attorney being given to three, and nothing being stated of “survivors,” either in the warrant or the defeasance, judgment could be entered up at the suit of two.

Where a warrant of attorney is given to three for a joint debt due to them, and no mention is made either in the warrant or defeasance of survivors, judgment, however, may be entered up at the suit of the survivors.

PARKE, J.—As the debt would survive, the power to enter up judgment survives.

Rule granted.

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Jan. 31st.

KELLY v. DICKINSON and Another.

Where a prisoner applies for his discharge under the 48 Geo. 3, c. 123, his notice must be served on the plaintiff, and, therefore, service on his attorney is not sufficient. The application must be made to the Court in term time, and cannot be disposed of at chambers.

BALL appeared for the attorney, on whom a rule drawn up for the last day of term had been served, calling upon the plaintiff to shew cause why the defendant *Dickinson* should not be discharged out of the custody of the sheriff of *Middlesex* as to the execution at the suit of the plaintiff, pursuant to the 48 Geo. 3, c. 123. This rule had not been served on the plaintiff, but had been served on the attorney. The service on the attorney is not sufficient after judgment and execution. The authority of the attorney ceases with the judgment, certainly with the execution. He cited *Tipping v. Johnson* (a), in which *Heath, J.*, said—"That it appeared by several cases collected in *Rolle's Abridgment*, that the authority of the attorney determines with the judgment."

R. V. Richards—The rule has been drawn up to be served on the attorney.

PARKE, J. (after conferring with the officers).—This rule must be served on the plaintiff. The authority of the attorney has ceased.

R. V. Richards then applied to enlarge the rule and shew cause at chambers.

Ball.—This must be disposed of in term time. The act states "upon his or their application for that purpose in term time made to some one of his Majesty's superior Courts of record at *Westminster*, to the satisfaction of such Court, be forthwith discharged out of custody as to such execution by the rule or order of such Court (b)."

(a) 2 Bos. & Pul. 357.

(b) 48 Geo. 3, c. 123, s. 1.

PARKE, J.—The defendant must remain in prison until next term.

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R. V. Richards then applied to be at liberty to serve the plaintiff *to-day*, and to move at the rising of the Court.

Ball.—Such a course has never before been adopted; the Court will not sanction such a novel proceeding.

PARKE, J.—You may endeavour to serve the plaintiff, and I will mention the case to the other Judges.

His Lordship afterwards said, that he had stated the case to the other Judges, and that the Court were of opinion that the defendant must remain in prison until the next term.

Rule discharged (a).

(a) See *Wilson v. Mokler*, *post*, p. 549.

DOE d. NORRIS v. ROE.

Jan. 31st.

DAMPIER moved for judgment against the casual ejector. The only difficulty was, whether this case came within the meaning of the 11 *Geo. 4* & 1 *Will. 4*, c. 70, s. 36 (a). The title of the plaintiff accrued during *Hilary* Term, and, therefore, the application was made under the above statute. The property was situate in *Middlesex*; and the question therefore was, whether the act applied to cases where the trial of the ejectment would not be at the Assizes, but at *Nisi Prius* in *Middlesex*. The words of the preamble of the section were—"And whereas landlords to whom a right of entry into or upon any lands or hereditaments may accrue during or immediately after *Hilary* and *Trinity* Terms respectively, are at pre-

Where a landlord's right accrues during *Hilary* Term, and the premises are situate in the county of *Middlesex*, proceedings cannot be had for their recovery under the 11 *Geo. 4* & 1 *Will. 4*, c. 70, s. 36.

(a) 1 Dowl. Stat. 387.

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sent unable to prosecute ejectments against their tenants, so as to try the same at the Assizes immediately ensuing." The word "Assizes," he submitted, meant *Nisi Prius* in *Middlesex*. If it were not to be so construed, the object of the statute would fail. The object of it was to give a speedier remedy to landlords, where their title accrued in *Hilary* or *Trinity* Terms.

PARKE, J.—I do not think this case comes within the statute. The case contemplated by it is where, unless a speedier remedy is given, the landlord would, when his title accrued in *Hilary* Term, be driven over to the Summer Assizes to try his cause. But here, the plaintiff may try it in *Easter* Term, without waiting until the *Summer* Assizes.

Rule refused (a).

(a) See *Doe v. Roe*, ante, p. 79, and *Doe v. Roe*, ante, p. 304.



Jan. 31st.

DEVEREUX v. JOHN and Another.

A sheriff will not be entitled to relief under the 1 & 2 Will. 4, c. 58, s. 6, unless he comes in the first instance, on receiving notice of an adverse claim.

IN this case, the sheriff applied to the Court for relief under 1 & 2 Will. 4, c. 58, s. 6 (a). The *fi. fa.* came to his hands on the 17th *March*, 1832. He seized and sold on the 21st *March*. Notices of the bankruptcy of the defendant, and claim to the goods seized, were given and made on the same day. An application was made to the sheriff by the assignees in the month of *June*, but no answer was given by him. An action was commenced by the assignees in the month of *September*. A declaration was delivered on the 16th *November*, and the sheriff obtained time to plead. On the 29th *November*, after term, he took out a summons for relief under the Interpleader Act.

(a) See 2 Dowl. Stat. 571.

Hayes appeared for the assignees.

Watson appeared for the execution creditor.

Evans appeared for the sheriff.

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 JOHN.

PARKE, J.—This act was not intended to afford relief in such cases as the present. Although no time is mentioned in the act, yet the sheriff must come within a reasonable time. But here, the sheriff suffers an action to be brought against him, and keeps possession of the goods for several months. He has made his election, and, therefore, this case is not within the act.

Rule discharged, the sheriff paying the costs of all parties.

WILSON v. MOKLER.

Jan. 31st.

BODKIN moved to discharge a defendant out of custody, under the 48 Geo. 3, c. 123, who had remained in execution twelve calendar months for a debt not exceeding 20*l*. The act of Parliament required that the notice of the application should be served upon the plaintiff himself; but the plaintiff's residence could not be discovered, and the plaintiff's attorney did not know where his client resided. The notice, therefore, had been served upon the attorney.

Where a plaintiff's residence cannot be found, the defendant who applies for relief under 48 Geo. 3, c. 123, may serve the notice required by that statute on the plaintiff's attorney.

PARKE, J.—Take your rule.

Rule granted (a).

(a) See *Kelly v. Dickinson and Another*, ante, p. 546.

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WHITE and Another v. STRATTON.

[Before the Four Judges.]

Jun. 31st.

Where a defendant escapes from the custody of the marshal, the latter, if served with the common side-bar rule "to bring the defendant into Court," &c., must give notice of the escape to the plaintiff's attorney within the time limited by the rule.

WHITE had obtained a rule, calling on the marshal of this Court to shew cause why an attachment should not issue against him for disobedience to a rule to acknowledge the defendant in his custody. The defendant being a prisoner in the rules of the prison of this Court, on the 4th of *August* last a detainer was lodged against him at the suit of the plaintiff; final judgment was obtained on the 10th *November*; and a side-bar rule, in the common form, calling on the marshal to bring the defendant into Court, or give a note in writing, acknowledging the defendant to be in his actual custody, or to shew cause to the contrary, upon notice thereof being given to the plaintiff's attorney, was served on the 14th instant, returnable within three days next after notice thereof. And this time having elapsed without the marshal bringing the defendant into Court, or giving a note in writing acknowledging the defendant to be in his actual custody, or any notice given to the plaintiff's attorney of cause to the contrary, the present rule was obtained in the full Court, at the desire of *Parke, J.*, to whom the matter was first mentioned in the Practice Court.

The *Solicitor-General* now shewed cause.—This is a very novel proceeding, no instance having ever occurred of the like application. The side-bar rule presented three alternatives: that the marshal should, within three days after notice thereof, bring the defendant into Court, or should give a note, in writing, acknowledging the defendant in his actual custody, or shew cause to the contrary within the time aforesaid, upon notice thereof being given to the plaintiff's attorney. Now, it was impossible to pur-

sue either of the two first alternatives; for it appears, on an affidavit of the deputy marshal, that the defendant had escaped, and that the escape was an involuntary one by the defendant, who had the privilege of the rules. With respect to the last alternative, of shewing cause, not only does it appear that the plaintiffs' attorney's clerk was told at the time of serving the side-bar rule, that the defendant had escaped, but a notice was served on the plaintiffs' attorney on the 19th of *January*, offering to shew cause. It is true that the side-bar rule had expired on the 18th; but, after this notice, the plaintiffs' attorney was irregular in making the present application.

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LITLEDAL, J.—Not irregular: you ought to have given the notice earlier.

White, contra.—The plaintiffs are entitled to have this rule made absolute. With respect to the objection of novelty, it does not appear that the marshal has, on any former occasion, disobeyed all the alternatives. And, with respect to the excuse here offered, that is not an excuse within the meaning of the last alternative, giving an option to shew cause. It is said that the defendant has escaped, and that it would be hard to punish the marshal by an attachment for contempt in suffering a prisoner, who has the privilege of the rules, to escape. But, in the first place, a suffering to escape, whether negligently or voluntarily, is a breach of duty on the part of the marshal, and is no cause, within the meaning of the side-bar rule, to excuse a non-compliance with the two first alternatives: such an excuse could only arise from the death of the defendant, or his change of custody, or some other *legal* act. But, there is no hardship here in fixing the marshal with the whole debt; for the statute 8 *Will. 3*, c. 27, which in s. 1 requires the marshal *actually to detain* within the

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prison, or the rules thereof, all prisoners either upon contempt or *mesne* process, or in execution, who shall be committed to his custody, provides, by s. 5, that nothing therein contained shall extend to make void securities for lodging within the rules. The marshal, therefore, may enforce his security to the extent he shall be damnified in this proceeding. With respect to the notice served on the 19th, of the marshal's readiness to shew cause, that came too late; and, as to the admission made to the plaintiff's attorney's clerk at the marshal's office, on the service of the side-bar rule, that the defendant had escaped, it was too doubtful whether that would bind the marshal in an action for an escape to be safely relied on.

The *Solicitor-General* here tendered an admission on behalf of the marshal, that the defendant had escaped; and the Court, who were strongly against *White* throughout his argument, discharged the rule on the terms of that admission being embodied in the rule for such discharge.

Rule discharged.

Jan. 31st.

EDRUPP v. DAVIES.

Giving notice that a cause will be taken as undefended at the Sittings in London, and appearing for the purpose of trying the cause as undefended, is not a sufficient taking the cause down to trial, to prevent the defendant from obtaining judgment as in case of a nonsuit.

THESIGER shewed cause against a rule for judgment as in case of a nonsuit. It was a town cause, and was in the list last *Trinity* Term. Notice was given to the defendant, that the cause would be taken as undefended on the undefended cause day in *Trinity* Term. On that day counsel appeared, and said the cause was defended. It was accordingly directed to keep its place in the list.

After term, it was again put down as an undefended cause; and on counsel again appearing to say that it was defended, it was again directed to keep its place in the list. It had, therefore, been taken twice down to trial by the plaintiff, and made a *remanet*; and, therefore, the defendant was not entitled to judgment as in case of a nonsuit; as it was the established practice of the Court, that, when a plaintiff had once taken down his cause for trial, and it had been made a *remanet*, judgment as in case of a nonsuit could not be obtained.

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Platt, contra, contended that the cause had not here been taken down to trial, so as to prevent the defendant from obtaining judgment as in case of a nonsuit; because that was only in cases where the cause had been made a *remanet*, and it could only have been made a *remanet* when the Court came to it in its turn. Here, the Court had not come to it in its turn, and, therefore, it could not be made a *remanet*. The plaintiff had merely thought proper to give notice that he would try it as an undefended cause; and when it appeared that it was defended, and of course was directed to keep its place in the list, he called that making it a *remanet*. If this were to be considered as taking down a cause to trial, so as to prevent a defendant from obtaining judgment as in case of a nonsuit, a plaintiff might in every case give notice that he would take the cause as undefended, and then, whatever delay might exist in his proceedings, he could never be subject to judgment as in case of a nonsuit, but the defendant must try by proviso.

PARKE, J.—I find there is a distinction between the Assizes and the Sittings in *London*. A plaintiff does not take his cause down to trial, so as to prevent the defendant from obtaining judgment as in case of a nonsuit, un-

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less it is come to in its turn, and made a *remanet*. Here it was not come to in its turn, and therefore it was not made a *remanet*. The plaintiff must give a peremptory undertaking.

Rule discharged, on plaintiff's giving a peremptory undertaking (a).

(a) See *Mewburn v. Langley*, 3 S. C. 3 Bing. 499; and *Brown v. T. R.* 1; *Denman*, Demandant; *Rudd*, ante, p. 371.
Bull, tenant, 11 B. Moore, 443;

UNIFORMITY OF PROCESS ACT.

VARIOUS decisions and opinions have been pronounced and given by the Judges as to what is necessary to be done by a plaintiff, who has been unable to serve a defendant personally with a summons, in order to obtain a *distringas*. The result of those decisions appears to be, that, where the defendant's residence is known, the person endeavouring to serve the summons should call three times at the defendant's residence. At the first visit he should state to some person on the premises the object of his call, and make an appointment to call on some future day at a certain hour. At the time appointed he should call again, and leave a copy of the summons. On a future day, within a reasonable time, he should call again to ascertain the result of his previous calls. When eight days have expired from the day of leaving the copy of summons, if the defendant has not appeared according to its exigency, an application may be made to the Court or a Judge for a *distringas*. What will be necessary to be done in order to entitle a plaintiff to enter an appearance for a defendant, where the return to the *distringas* is *non est inventus*

and *nulla bona*, has not yet been decided. From the mode in which *Parke, J.*, treated such an application, it should seem that the Court would look at the previous steps taken by the plaintiff in order to entitle himself to a *distringas*. Where the *distringas* is executed, and the defendant has not obeyed the exigency of the writ, we have seen by the decision in *Johnson v. Smealey (a)*, that the plaintiff may, on an affidavit of the execution of the *distringas*, and service of the copy, enter an appearance at once for the defendant, without application to the Court.

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PROCESS ACT.

Where the residence of the defendant is unknown, endeavours must be made to serve the defendant personally, before the *distringas* can be obtained. What will be considered as sufficient endeavours to entitle a plaintiff to his *distringas* in such cases, has *not been* decided by the Courts.

(a) *Ante*, p. 526.

END OF HILARY TERM.

COURT OF EXCHEQUER,

Easter Term,

IN THE SECOND YEAR OF THE REIGN OF WILLIAM IV.

1832.

WATSON, One &c., v. POSTAN and Another.

The Court has discretionary power, where an action is brought on an attorney's bill, to refer it for taxation, without requiring the undertaking provided by the 2 Geo. 2, c. 23.

THIS was an action to recover the amount of an attorney's bill. The defendant *Postan* obtained at his instance only a Baron's order to tax, without being required to give the usual undertaking to pay the amount at which the costs should be taxed.

Busby applied to rescind that order.

Per Curiam.—This order was not made in pursuance of the act of Parliament, the 2 Geo. 2, c. 23, but under the common law jurisdiction of the Court, and it can mould its orders as it thinks right. There is no objection to the Court in its discretion ordering a taxation in a case where an action is depending without an undertaking from the defendant to pay what shall be found due. It is entirely in the discretion of the Judge to say upon what terms the matter should go before the Master. In an action against two, one defendant may very reasonably say, "I dispute my liability altogether, but still I wish to have the amount properly ascertained."

Rule refused (a).

(a) This case is also reported in 2 Crompt. & Jerv. 370. See *Jones v. Byewater*, post, p. 557, and *Dagley, Gent., One, &c. v. Kentish*,

ante, p. 330. The words of the act are, "on submission of the parties," &c. "to pay," &c.

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ACTION on an attorney's bill. All the items in the bill were for business done in suing out and prosecuting a commission of lunacy against a person who was found by the inquisition of the jury not to be a lunatic. A rule was obtained by *Thesiger* for referring the bill to be taxed.

Applications to tax an attorney's bill for business done in lunacy should be made to the Chancellor. *Quære*, whether a bill for business done in lunacy is taxable.

Wakefield shewed cause, and contended that business done in lunacy was neither at law nor in equity. The jurisdiction over lunatics was not given to the Chancellor as a matter of course, but was granted by a separate writ, and did not necessarily follow the Great Seal. The present proceeding, however, was by commission and not by writ; the mode of proceeding by writ having been long disused. The business here had not been done in any Court. It need not have been done before legal persons. He cited *Dagley v. Kentish* (a) and *Ex parte Daun* (b).

Thesiger, contra, contended that the items were taxable, as the proceeding was at law. The commission issued out of the Petty Bag Office, and errors in such proceedings must be rectified by writ of error. He cited 3 *Black. Comm.* p. 427; 3 *P. Williams*, p. 138; and *Collins v. Nicholson* (c), and *Burton v. Chatterton* (d).

Lord LYNDHURST, C. B.—There is a petition in the first instance to the Chancellor, and that petition is heard upon affidavits. If the petition is granted, the commission issues from the office of the Clerk of the Custodies. When the inquisition is taken, it is returned into the Petty Bag Office. If any proceedings take place upon that return, it

(a) *Ante*, p. 330.

(b) 9 Ves. 547.

(c) 2 Taunt. 321.

(d) 3 Barn. & Ald. 486. But see *Crowder v. Davies*, 3 Younge & Jervis, 433.

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is by petition to the Chancellor. The party then traverses. which he has a right to do, on application being made for that purpose. That traverse is heard in the Court of *King's Bench*, and then the proceedings are returned again into the Court of *Chancery*. It is not necessary for us to decide whether this is a bill taxable or not. If it is taxable, the Chancellor has jurisdiction over it; and if it is a bill which ought to be taxed, it will be better taxed by the officers of the Chancellor, who are accustomed to proceedings in lunacy. We think, therefore, the application should be made to the Chancellor; but we give no opinion whether the application ought to be granted.

Rule discharged (a).

(a) This case is also reported in 2 C. & J. 371.

NOEL v. WILLIAMS.

Affidavit of debt.
"A. B., clerk to
L. J. J. N.,
maketh oath
that the defend-
ent is indebted
to the said J.
N.;" the *quo mi-
nus* at the suit of
L. J. J. N.—
Held, no va-
riance.

WHITCOMBE moved to discharge a defendant out of custody on filing common bail, on the ground of a variance between the *quo minus* and the affidavit to hold to bail. The *quo minus* was at the suit of *Lewis Joseph John Noel*, and the affidavit stated the defendant to be indebted to the *said John Noel*. The deponent making the affidavit described himself as clerk to *Lewis Joseph John Noel*.

Per Curiam.—The word "said" refers to the person previously named.

Rule refused (a).

(a) This case is also reported in 2 C. & J. 379.

1832.

WINPENNY v. BATES.

HOGGINS moved to make an agreement of reference a rule of this Court. By the agreement, four actions depending between the parties to the reference, three of which were in this Court and the fourth in the *King's Bench*, were referred to arbitration; and, by a clause introduced, it was directed that the agreement should be made a rule of the Court of *King's Bench* or *Exchequer*. The arbitrator having made his award, the original agreement was filed in the *King's Bench*. The application now was to make the agreement a rule of this Court on filing a copy, for certain reasons stated in the affidavit supporting the motion.

Where an agreement of reference is to be made a rule in the alternative of one of two Courts, and it is made a rule of one, it cannot be made a rule of the other: *Semble*, that under the 9 & 10 Will. 3, such an agreement in the alternative is illegal.

LORD LYNTHURST, C. B.—The agreement is in the alternative "*King's Bench* or *Exchequer*." That might be a sufficient ground for the Court not interfering; but, I see no necessity for such a rule, as the Court of *King's Bench*, of which Court the agreement has already been made a rule, has the full power of dealing with the matter as effectually as this Court could.

The other Barons concurring, the rule was—

Refused (a).

(a) This case is also reported in 2 C. & J. 379.

1832.

PIM v. WOODMAN.

Where a defendant is entitled to an imparlance, which he obtains, he does not thereby waive his right to demur.

MANSEL applied for leave to sign judgment in the present case. The declaration was filed the day after *Hilary* Term, and was entitled generally as of *Hilary* Term, and stated that the plaintiff came into Court on the 11th day of *January*, and complained by bill that the defendant was, on the 20th *January*, indebted to him. The defendant obtained an imparlance, and in *Easter* Term demurred specially, on the ground that the bill appeared by the declaration to have been exhibited before the cause of action accrued. He cited *Thompson v. Collier* (a), where it was said, that the defendant "by entering on his defence, by his imparlance accepts the bill to be good."

BAYLEY, B.—It is quite new to ask the Court to authorize a party to sign judgment; and I think we ought not in this case to interfere. If the plaintiff is entitled to sign judgment, he may do so at his peril. The case in *Yelverton* was the case of a plea in abatement. It is well known that you cannot plead in abatement except of the term in which the declaration is delivered or filed, because you must plead in abatement in the first instance; but I am to learn that this rule is equally applicable to cases of special demurrer. The defendant is entitled to and obtains an imparlance, and when he sees the declaration, discovers that the cause of action accrued nine days after the bill was filed. I know of no rule which says that the defendant shall not be at liberty to point out that as a ground of special demurrer. A demurrer is a plea in bar, as appears by the conclusion. We should be acting contrary to all rule if we were to entertain this application.

The rest of the Court concurred, and the rule was—

Refused (b).

(a) *Yelv.* 112.

(b) This case is also reported in 2 C. & J. 464.

1832.

DAVIS v. SALTER and Others, Executors.

KNOWLES moved on the part of the defendants, who were the executors of *Thomas Salter*, to stay proceedings in the present action. A suit in equity had been commenced against them, and an injunction had been obtained, prohibiting them from selling or assigning the lease in the pleadings of the cause in equity mentioned, or collecting any debts or disposing of any of the personal property, stock in trade, or effects belonging to the estate of the testator. While this injunction was pending, the present action was brought. If the defendants were to pay the debt sought to be recovered by the plaintiff, they would be guilty of a contempt of the Court of equity. If they resisted the demand, they might unnecessarily accumulate costs against the estate. The defendants denied their liability to the plaintiff's demand.

Where an action is brought against executors who are restrained by an injunction from disposing of their testator's effects, and they resist the claim, the Court will not stay proceedings, although, if a judgment had been signed, it might stay execution.

BAYLEY, B.—The application is too early. The plaintiff is entitled to have his debt ascertained. The injunction may hereafter be a ground for having execution stayed.

Rule refused (*a*).

(*a*) This case is also reported in 2 C. & J. 466.

DOWNES v. CROSS.

THE defendant's attorney in this case had agreed with the plaintiff's attorney to accept short notice of trial or no

An agreement by a defendant to take no notice of trial is not equivalent

to a notice of trial, so as to entitle a defendant to judgment as in case of a nonsuit for not proceeding to trial.

1832.

DOWNES

v.

CROSS.

notice at all. In consequence of this arrangement no notice was given, but both parties attended the Assize town with their witnesses, and the plaintiff's attorney did not enter the record.

Knowles moved for judgment as in case of a nonsuit, on the ground, that this agreement as to notice of trial not being given was equivalent to notice, and, therefore, that the plaintiff had neglected to take his cause down to trial, according to the practice of the Court.

BAYLEY, B.—If the plaintiff had given a notice of trial the defendant would have been entitled to judgment as in case of a nonsuit. No notice was actually given. But it is said, that the agreement to take no notice was equivalent to notice. We are of opinion that it was not equivalent to a notice, for the purpose of this motion.

Rule refused (a).

Knowles afterwards obtained a rule for the costs of the day for not proceeding to trial, on the same affidavit.

(a) This case is also reported in 2 C. & J. 466.

TOWNSEND v. BURNS.

Where a plaintiff seeks to hold a defendant to bail for a sum of money, to which he alleges he has rendered himself liable for the defendant, he must shew clearly that that liability has been incurred.

KELLY obtained a rule *nisi* for delivering up the bail bond to be cancelled, on the defendant filing common bail, on the ground that the affidavit of debt was insufficient.

Where a plaintiff seeks to hold a defendant to bail for a sum of money, to which he alleges he has rendered himself liable for the defendant, he must shew clearly that that liability has been incurred.

The affidavit stated that the defendant was justly and truly indebted to the plaintiff in 25*l.*, by virtue of an agreement, whereby the plaintiff agreed to procure a lease to be granted to the defendant, and the defendant agreed to pay the plaintiff, his solicitor, or agent, 25*l.*, in full for his share, or proportion of the costs and expenses of the agreement, and of the lease and counter-part, and of a proposal to be laid before a Master in *Chancery* for a grant of the lease; the lease and counterpart being to be prepared by the plaintiff's solicitor; and that the plaintiff did procure a lease to be granted, which was prepared by the plaintiff's solicitor, but did not state that the plaintiff had paid the solicitor, or had himself borne or incurred the expenses.

1832.
TOWNSEND
v.
BURNS.

Alexander shewed cause against the rule.

BAYLEY, B.—The present rule ought to be made absolute. The ground of my judgment is, that there is no allegation that the plaintiff has himself borne the costs and expenses stated in the affidavit. Consistently with it the defendant may still be called on to pay the solicitor for these very expenses.

The other Barons concurred.

Rule absolute (a).

(a) This case is also reported in 2 C. & J. 468.

LENNIKER v. BARR.

ON discharging a rule for judgment as in case of a nonsuit for not proceeding to trial, an application was made

Where the Court discharges a rule for judgment as in case of a

nonsuit, it will make an order for the payment of the costs of the day, but not as a condition of discharging the rule.

1832.
 L^{ENN}I^KE^R
 v.
 B^{ARR}.

for the costs of the day under 1 *Reg. Gen. H. T. 2 Will.* 4, s. 69 (a).

BAYLEY, B.—The defendant may have the costs of the day, as the subject of a separate order, but not as a condition of discharging the rule (b).

- (a) *Ante*, p. 192. 2 C. & J. 473. See *Piercy v. Owen*,
 (b) This case is also reported in *ante*, p. 362.

PERRY's Bail.

Where bail are
 added by a
 Judge's order,
 four days' no-
 tice of bail need
 not be given.

JOHN JERVIS opposed the justification of bail, on the ground that they had been substituted for those originally put in, and that the Baron's order for that purpose had not been made until the morning of justification. The substituted bail must, therefore, be considered as new bail, and consequently four days' notice of justification was necessary by 1 *Reg. Gen. T. T. 1 Will.* 4 (a).

BAYLEY, B.—A notice of bail who are to be put in and to justify at the same time, must be given four days before the justification. But that rule only applies where no bail have been originally put in. Here, bail were properly put in, and a notice to add other bail given. That notice, however, could not be rendered valid without a Judge's order to change the bail. As the plaintiff was not bound to inquire into the sufficiency of the bail until he knew that the Baron's order was made, he may have time to inquire (b).

- (a) *Ante*, p. 102. (b) This case is also reported in 2 C. & J. 475.

1832.

JONES, Assignee of THOMAS v. OWEN.

IN this case, the defendant paid into Court 1*l.* 3*s.* 7*d.* under an order, which did not contain the usual undertaking from the defendant to pay the costs. It being doubtful whether the plaintiff, if he accepted that sum, would be entitled to costs, the defendant offered to give the plaintiff judgment of the term for that sum, in order to take the opinion of the Court upon the question. The plaintiff, however, took the cause to trial, and, upon the production of the rule to pay money into Court, had a verdict for one shilling. A rule *nisi* was obtained for setting aside the verdict, staying proceedings, and payment by the plaintiff of the costs incurred after the payment of the money into Court.

Where money had been paid into Court, and it was doubtful whether the plaintiff, if he took it out, would be entitled to his costs, and the defendant offered to give him judgment of the term, in order to take the opinion of the Court, and the plaintiff proceeded and obtained a verdict for only a shilling, the Court set aside the verdict and compelled him to pay the defendant's costs from the time of the defendant's offer.

Evans and *E. V. Williams* shewed cause.

Whitcombe and *John Jervis* supported the rule, and cited *Fleming v. Davies* (a) and *Bateman v. Smith* (b).

BAYLEY, B.—This verdict ought to be set aside, and the plaintiff should pay the defendant all costs incurred subsequently to the offer on the part of the defendant. The costs incurred since that date have been occasioned entirely by the plaintiff. We have an authority in the case of *James v. Raggett* (c) for ordering the plaintiff to pay such costs. The defendant, however, is not without blame, he ought to have served the rule of Court immediately, and brought it before the attention of the learned Baron when the summons was heard, which was before the offer made by him to the plaintiff. I think, therefore, that we shall best answer the justice of the case

(a) 5 D. & R. 371. (b) 14 East, 301. (c) 2 B. & Ald. 776.

1832.

JONES
v.
OWEN.

by setting aside the verdict and staying all further proceedings, ordering the plaintiff to pay to the defendant the costs incurred after the offer made, and the plaintiff to receive from the defendant the costs up to that time.

The rest of the Court concurred.

Rule accordingly (a).

(a) This case is also reported in 2 C. & J. 476.

HALL v. WELCHMAN.

The old process might have been made returnable on a day between the *Thursday* before, and the *Wednesday* after, *Easter* day, when those days fell within *Easter* Term.

MANSEL moved to set aside a writ of *venire facias ad respondendum*, on the ground that it had been made returnable on the *Saturday* immediately before *Easter* day. Although that day fell within *Easter* Term, yet by the 11 *Geo. 4* & 1 *Will. 4*, c. 70, s. 6 (a), the days intervening between the *Thursday* before and the *Wednesday* next after *Easter* day, were not juridical days; and, therefore, writs which, in contemplation of law, were returned before the Judges sitting in banc could not be returnable on such days. The rule of Court of the present term (b) directed that such days should not be reckoned or included in any rules, notices, or other proceedings, except notices of trial.

Cur. adv. vult.

LORD LYNTHURST, C. B.—We have conferred with the other Judges, and we are all of opinion that the writ was made properly returnable.

Rule refused (c).

(a) See 1 Dowl. Stat. 371.

(b) *Ante*, p. 423.

(c) This case is also reported in 2 C. & J. 472.

1832.

CROMPTON *v.* STEWART.

JOHN JERVIS moved to change the venue from *London* to *Lancaster*, in an action of covenant on a mortgage deed, upon the ground that the witnesses for both parties were resident in the latter county.

In covenant, in order to entitle a defendant to change the venue, upon the ground that the witnesses on both sides reside in the county into which it is sought to change the venue, it must be sworn that it will be necessary for him to call witnesses in his defence.

BAYLEY, B.—In such a case as this, the venue cannot be changed upon the usual affidavit. In order to support a special application, for the sake of saving the expense of bringing witnesses from a distance, the defendant should shew by affidavit that he must necessarily call witnesses for his defence.

Rule refused (*a*).

(*a*) This case is also reported in 2 C. & J. 473.

FIELD *v.* COPE.

IN this case the sheriff obtained a rule for relief under the 1 & 2 *Will.* 4, c. 58, s. 6 (*a*). The sheriff had seized under a *fi. fa.*, and while in possession received notice of a *fiat* issued against the defendant.

Where a sheriff has obtained a rule under the interpleader act, and the execution creditor does not appear, the Court will permit the sheriff to withdraw from possession, but will not grant him his costs of keeping possession after notice of an adverse claim.

R. V. Richards appeared for the assignees; but the plaintiff did not appear. The rule was therefore enlarged, and **Whitmore**, on the part of the sheriff, obtained a further rule that the sheriff might be at liberty to withdraw from the possession of the goods. Both rules came on together, plaintiff still not appearing.

Whitmore contended that the defendant's assignees ought to pay the sheriff his costs which had been incurred since the notice was given by them.

(*a*) 2 Dowl. Stat. 571.

1832.

FIELD
v.
COPE.

Per Curiam.—It is not the practice to give costs to the sheriff, who is relieved by this act from a liability cast on him by law. As the plaintiff does not appear, the first rule must be discharged, but the second made absolute.

Rule accordingly (a).

(a) This case is also reported in 2 C. & J. 480. See *Bowdler v. Smith, ante*, p. 417.

HARRIS v. ALCOCK.

The time for rendering a bankrupt will be enlarged by the Court, notwithstanding the provisions of the 11 Geo. 4 & 1 Will. 4, c. 70, s. 21, authorizing the render of defendants in discharge of bail to the county prison.

THESIGER, on behalf of the creditors of the defendant, applied for a rule *nisi* for time to render the defendant, until he should have passed his final examination before the commissioners of bankrupt, with a stay of proceedings in the meantime. The defendant resided in *Birmingham*, and had been arrested on a *quo minus capias*. He was bailed, and was afterwards declared a bankrupt, upon a commission issued to certain persons residing at *Birmingham*. At that place the commission was opened on the 12th *January*. The defendant surrendered, and was allowed time to pass his examination; and the last sitting was fixed for the 24th *February*. The estate of the bankrupt would be put to great expense if the bankrupt were rendered, and the commissioners obliged to come to town to take his final examination. He cited *Crump v. Taylor* (a), *Maude v. Jowett* (b), *Glendinning v. Robinson* (c).

BAYLEY, B.—The decisions cited were pronounced before the 11 Geo. 4 & 1 Will. 4, c. 70, s. 21 (d), which al-

(a) 1 Price, 74.
(b) 3 East, 145.

(c) 1 Taunt. 320.
(d) 1 Dowl. Stat. 381.

lows a render to the gaol of the county in which the defendant is arrested. The case must stand over, in order to ascertain whether it will be inconvenient for the commissioners to attend at *Warwick* or *London* to take the bankrupt's examination.

1832.

HARRIS
v.
ALCOCK.

On a subsequent day such an affidavit was produced, and the Court granted a rule *nisi* to enlarge the time for rendering the defendant until four days after his final examination. No cause being shewn, the rule was made—

Absolute (a).

(a) This case is also reported in 2 C. & J. 486.

DOE d. WALKER v. ROE.

GODSON moved for judgment against the casual ejector. The declaration and notice had been accepted by an attorney of the *Common Pleas*.

If an attorney of one Court accept a declaration in an ejectment brought in another, it is no ground for a rule, either absolute or *nisi*, for judgment against the casual ejector.

BAYLEY, B.—If he be not an attorney of this Court, how are we to animadvert upon him? If he has acted wrongfully in the matter, we ought not to grant a rule *nisi*, so as to impose on the party the expense of two rules. It will be very easy to get the declaration accepted by an attorney belonging to this Court.

Rule refused.

The rule was afterwards granted, on an attorney of this Court accepting the declaration (a).

(a) This case is also reported in 2 C. & J. 381.

1832.

ALEXANDER v. MILTON.

In an affidavit of debt by an attorney's clerk, he may state the place of business of his employer as his residence.

CURWOOD applied to have the bail bond in this case delivered up to be cancelled, on the ground that the affidavit of debt did not describe the residence of the deponent according to the rule (a), which required "the true place of abode." The deponent described himself as clerk to *A. B.* and *C. D.* of &c. (stating their place of business).

BAYLEY, B.—If by residence is meant the place where he sleeps, he would probably not be found there in the day time. The affidavit contains the true place of abode, within the meaning of the rule. It states the place where the deponent may generally be found from morning to night.

Rule refused (b).

(a) M. T. 15 Car. 2.

(b) This case is also reported in 2 C. & J. 424.

MORGAN v. HARRIS.

Where a plaintiff claims, by his particulars annexed to the record, more than is stated in his particulars delivered, and the plaintiff obtains a verdict, the Court will not direct a non-suit to be entered, unless the defendant was in a condition to make the objection at the time of the trial; and the point was reserved.

ASSUMPSIT for work, labour, and materials. Particulars had been delivered under a Baron's order, and annexed to the record, pursuant to 6 *Reg. Gen. T. T.* 1 *Will.* 4 (a). The particulars delivered stated the claim to be for work done and materials supplied during *March, April, and June, 1826, and March, 1827.* The particulars annexed to the record contained these additional words "also for work done at different times from about *June, 1826, to August, 1827.*" At the trial, the plaintiff claimed for work done in *August, 1826,* a period not included in the particulars delivered, but comprehended with-

(a) *Ante*, p. 103.

in those annexed to the record. It was objected that the plaintiff was precluded by the particulars delivered from going into such evidence. Upon examining the particulars annexed to the record, the discrepancy was discovered; and the defendant not being prepared to prove the delivery of the particulars to him, the plaintiff had a verdict for 20*l*.

1832.
MORGAN
v.
HARRIS.

John Evans obtained a rule *nisi* for entering a nonsuit and *E. V. Williams* shewed cause.

LORD LYNTHURST, C. B.—If the defendant had been in a condition to raise the point at the trial, by shewing the discrepancy between the particulars delivered and those annexed to the record, and the point had been reserved, we might have ordered a nonsuit to be entered. But, even with that evidence, the plaintiff might have insisted upon the case going to the jury. We, therefore, have no power to enter a nonsuit, although the defendant is entitled to a new trial. We might have made the plaintiff's attorney pay the costs of the former trial, if the rule had been framed with that view; but it is silent upon the subject of costs.

Rule absolute for a new trial, without costs (*a*).

(*a*) This case is also reported in 2 C. & J. 461.

HUTCHINSON'S Bail.

BUSBY opposed the justification of country bail, on the ground that the affidavit stated them to be *possessed* of the requisite sum, instead of stating them to be *worth* that amount. They might be temporarily possessed of that sum, and yet have no property (*a*).

In an affidavit of justification, it is insufficient to state that the bail are *possessed* of the required property.

(*a*) See 1 Reg. Gen. H. T. 2 Will. 4, s. 19, *ante*, p. 185.

1832
 HUTCHINSON'S
 Bail.

GURNEY, B., consulted the other Barons, and then held the affidavit insufficient. He gave time to put in fresh bail, on the terms of taking short notice of trial, and putting the plaintiff in the same situation (a).

(a) This case is also reported in 2 C. & J. 487.

Trinity Term,

IN THE SECOND YEAR OF THE REIGN OF WILLIAM IV.

COX v. THOMASON.

The general issue, pleaded to a declaration containing several counts, tenders a distinct issue on each count; the defendant therefore is entitled, under 1 *Reg. Gen. H. T. 3 Will. 4, s. 74*, to the costs of the counts found for him.

The above general rule of *H. T.* applies to all taxations after the commencement of *Easter Term*.

CROWDER obtained a rule *nisi* for reviewing the Master's taxation, on the ground of his not having pursued the directions of 1 *Reg. Gen. H. T. 2 Will. 4, s. 74(a)*. It was an action on the case, and the declaration contained eighteen counts. The defendant pleaded the general issue to the whole. The jury found for the plaintiff on three counts—Damages, 40s.; and for the defendant on the remainder of the declaration. The Master allowed the plaintiff his costs on the three counts found for him only, and did not allow any deduction to the defendant in respect of the costs of the counts found for him. By the words of the rule of *Hilary Term*, the defendant was clearly entitled to such a deduction. The words of it were—"No costs shall be allowed on taxation to a plaintiff, upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs."

(a) *Ante*, p. 193.

Erle shewed cause against the rule.

Cur. adv. vult.

1832.
Cox
v.
THOMASON.

BAYLEY, B.—The question in this case turned on the construction of 1 *Reg. Gen. H. T. 2 Will. 4*, s. 74; and we are to determine whether, under that rule, the defendant is entitled to have the costs of the counts found for him deducted from the costs of the counts found for the plaintiff. On shewing cause it was urged that he was not, on two grounds—*First*, that costs could only be deducted for the defendant where distinct issues are joined on distinct pleas, and that the general issue was here indivisible—and, *Secondly*, that the rule, not having come into operation till the first day of *Easter* Term, did not apply to costs which were incurred previously. All the Courts, however, agree in opinion, that a distinct issue is raised on each count by the general issue pleaded, without restriction; and, therefore, that the defendant is equally entitled to a deduction from the plaintiff's costs in respect of the counts found for him, as if issue had been joined on each of those counts by pleading separately to each. As to the other point, we are decidedly of opinion that the new general rule applies to every taxation which took place after the commencement of *Easter* Term last. The Court of *King's Bench* agrees with us in the construction of the rule; and the Court of *Common Pleas* does not differ, although it is not so strongly of that opinion as this Court and the Court of *King's Bench*.

Rule absolute (a).

(a) This case is also reported in 2 C. & J. 498.

1832.

TUCKER v. COLEGATE.

After the time for putting in bail above has elapsed, it is too late to object to the affidavit of debt.

GODSON obtained a rule *nisi* for cancelling the bail-bond on entering a common appearance, on the ground of a defect in the affidavit to hold to bail. The action was on a bill of exchange, and was brought by the indorsee against the drawer. The affidavit of debt did not state the default of the acceptor (*a*). The bailable *quo minus*, which was issued on this affidavit, was returnable on the 16th *April*, the second day of term (*b*); but the application was not made until the 28th of that month. During the period between the 16th *April* and the 28th, the four days between the *Thursday* before and the *Wednesday* after *Easter* day occurred. On those four days, the Court of course did not sit in *banc*.

Tomlinson shewed cause against the rule.

BAYLEY, B.—The application is too late. It is not material when the sheriff would be compellable to return the writ; for, as this is a town cause, the defendant ought to have put in special bail within four days exclusive after the return of the writ. If he had proceeded promptly so to do, this application would have been too late, even if (throwing out of consideration the four days) it had been made on the 25th. The interval between the first and the fifth days of the term was the time when the correctness of the affidavit of debt should have been inquired

(*a*) See *Buckworth v. Levi*, *ante*, p. 211; *Cross v. Morgan*, *ante*, p. 122; and *Banting v. Jadis*, *ante*, p. 445.

(*b*) By the 11 Geo. 4 & 1 Will. 4, c. 70, s. 6, the first day of *Eas-*

ter Term begins on the 15th *April*; and when that day falls on a *Sunday*, that day is still to be reckoned as the first day of term. See *Doe v. Roe*, *ante*, p. 63; 1 Dowl. Stat. 371.

into, in order to ascertain whether bail above should be put in.

The rest of the Court concurred.

Rule discharged, with costs (a).

(a) This case is also reported in 2 C. & J. 489.

1832.
TUCKER
v.
COLEGATE.

THORP v. WORDY.

IN this case the defendant gave a *cognovit*, after process had issued, without appearing or employing an attorney. The plaintiff signed judgment, and on the 5th May he sent a letter to an attorney at *Exeter*, inclosing a notice to tax costs, to be served on the defendant. As the defendant had left his former residence, the notice was sent on the 7th to an attorney at *Torrington*; and he served the defendant four or five miles from that place. For effecting this service, including postage, horse-hire, and letter to plaintiff's agent, he charged 1*l.* 12*s.* The Master on taxation took off this charge, considering that the notice might have been sent by post; and therefore only allowed the postage of a letter to *Exeter*, upon the principle of a notice by letter being sufficient.

The Court will allow reasonable costs of serving a notice of taxation.

Kelly moved to review the Master's taxation; and contended, that, as the party seeking to tax costs must, by 12 *Reg. Gen. T. T.* 1 *Will.* 4 (a), give one day's notice of taxation to the opposite party, he ought to be entitled to reasonable costs in giving that notice. The mere service by letter would be open to great fraud.

(a) *Ante*, p. 105.

1832.
 THORP
 v.
 WORDY.

BAYLEY, B.—I think that notice of the taxation of costs is of so much importance to the opposite party, that the Master should allow reasonable costs of giving notice in such a manner that the party concerned would have an opportunity of attending the taxation if he should think fit.

Taxation referred to the Master, with directions to that effect (a).

(a) This case is also reported in 2 C. & J. 488.

The ATTORNEY-GENERAL, on the relation of CRUPPER and Others, v. MALIN and Others.

A solicitor of the Court of Chancery, who has not been admitted on the equity side of the *Exchequer*, may practise there in the name of a sworn clerk of the Remembrancer's office, and is entitled to his fees.

IN this case the relators filed a bill on the equity side of the *Exchequer*, and for that purpose employed a solicitor of the Court of *Chancery*, who had not been admitted as a solicitor in the *Exchequer* in equity, and who practised in the name of a clerk in court of the King's Remembrancer. The defendant was ordered to pay the relators their costs on taking the answer off the file. The Master taxed the costs as between party and party, and allowed the solicitor his fees. Exceptions were taken by the defendant to the Master's report, on the ground that the solicitor was not entitled to fees. Lord *Lyndhurst*, C. B., referred the question to the full Court.

Boteler and *Wakefield* supported the exceptions, and cited *Meddowcroft v. Holbrook* (a), and *Vincent v. Holt* (b).

Stephen, Serjt., *G. Richards*, *Busby*, and *Mansel*, opposed the exceptions, and cited 2 *Man. Pract.* 195; *Vin.*

(a) 1 H. Bl. 50.

(b) 4 Taunt. 452.

Abr. "Atty." (K. 2); Thursby v. Warren (a), Keilway's case (b).

1832.
ATT.-GEN.
v.
MALIN.

LORD LYNTHURST, C. B.—This question is of importance to solicitors in the Court of *Chancery*, who have practised in the Court of equity in the *Exchequer Chamber*, without being admitted as solicitors in that Court. When it came before me at *Gray's Inn Hall*, on exceptions to the Master's report, I did not sufficiently advert to sect. 27 of 2 *Geo. 2*, c. 23, and considered myself bound by the case of *Vincent v. Holt*. However, I had so much doubt on the construction of the act, that I suggested the propriety of taking the opinion of the whole Court upon it. It has now been argued before us with considerable learning, and after elaborate researches on both sides. Looking at the stat. 2 *Geo. 2*, c. 23, independently of the 27th section, I entertain considerable doubts whether the decision of Lord *Loughborough*, in *Meddowcroft v. Holbrook*, was not correct. The clauses relating to the admission and inrolment of *attornies* are the same as those which relate to the admission and inrolment of *solicitors*; but, in the 10th section it is provided, that an attorney, sworn, admitted, and inrolled as such, in any of the superior Courts of common law at *Westminster, Wales*, or the counties palatine, may, by consent in writing of another attorney in any of the said other Courts, practise in the name of that attorney. The legislature did not, as it seems to me, intend to preclude a solicitor of one Court of equity from practising in another Court of equity, with the consent of a solicitor of that Court; and, sections 5 and 7 being similar, it was not necessary that there should be a clause for solicitors like sect. 10, which is applicable to *attornies*; because solicitors practise in the names of the

(a) Cro. Car. 159.

(b) March. Rep. 78.

1832.
 }
 ATT.-GEN.
 v.
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clerks in court; and, therefore, it does not follow, from the omission of such a clause, that a solicitor admitted and inrolled in one Court of equity should be precluded from practising in another Court of similar jurisdiction, in the name of another solicitor of the latter Court. A difficulty arises out of sect. 21, which confers upon solicitors admitted and inrolled in one Court of equity the privilege of being admitted and inrolled in another Court of equity, without payment of fees; and it seems that no advantage would be conferred on the solicitor by this clause, if Lord *Loughborough's* construction of the act is correct; for, if a solicitor could practise here in the name of a clerk in court, he would obtain no benefit by being admitted in the Court of equity here. However, that section applies to many other Courts of equity, of which we are little informed; and it is no more necessary to decide upon that decision, than upon the subsequent case of *Vincent v. Holt*, which seems to be the other way. The question now before the Court relates purely to the Court of *Exchequer*; and the legislature had this Court in view in the framing of this statute. Thus, by sect. 11, no additional attornies are to be admitted in any Court than have been accustomed to be admitted therein; under which provision there were but four sworn attornies in the Court of Pleas until the passing of the statute 11 *Geo. 4* & 1 *Will. 4*, c. 70. Again, in sect. 18, it is provided, thtt a roll shall be kept for attornies in the various Courts of law therein mentioned; and there is a similar provision as to solicitors admitted in the Court of *Exchequer*, but not for attornies of that Court; and the 27th section provides for the inrolment of the attornies or clerks of the offices of the *Exchequer* therein mentioned, according to the ancient custom of the Court. That section is not applicable to attornies or clerks of certain offices in the *Exchequer*; among others, the office of the King's Remembrancer. What then are

the officers of the King's Remembrancer? They are the sworn and side clerks, who execute the equity and revenue business. These persons are not admitted and inrolled according to 2 *Geo. 2*, c. 23, but in the manner accustomed before that act. So, likewise, were the attornies or clerks of the office of Pleas of the Court of *Exchequer*, before 11 *Geo. 4* & 1 *Will. 4*, c. 70. These attornies and clerks may, by the stat. 2 *Geo. 2*, c. 23, s. 27, practise in other Courts in the names and with the consent in writing of the attornies of such other Courts; and, by the concluding words of the section, which are material expressions in this case, it is enacted, that it shall be lawful, from and after the 1st *December*, 1730, for any person who shall be sworn, admitted, and inrolled an attorney or solicitor in any of the several Courts before mentioned, according to the direction of this act, to practise and solicit in the said *respective offices* in the same manner as heretofore has been done, anything hereinbefore contained, or any law or statute to the contrary notwithstanding. This enactment applies to the office of Pleas, and the office of the King's Remembrancer. We know that attornies of other Courts practised, before the late statute, in the office of Pleas, in the names of the attornies of the Court. Such is the construction put upon this section by practice, and nothing is produced to the contrary. What then has been the usage in the King's Remembrancer's office? The equity and revenue business is conducted there by sworn attornies, and many attornies practise in their names. Such has been the constant usage; and our decision is warranted as well by the act of 2 *Geo. 2*, as by the custom which has prevailed since that reign.

Though it may be usual that the party failing in an exception to the Master's report shall pay the costs of that proceeding; still, as there was so much doubt that I directed a second argument, and as my first opinion was ad-

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verse to that now entertained by the Court, I think the defendants ought not to pay the costs.

The rest of the Court concurred.

Exceptions overruled, without costs (a).

(a) This case is also reported in 2 C. & J. 500.

DREW v. COLES.

Jurisdiction is given to the *Bradford* Court of Requests, where the debt demanded does not exceed 5*l.*, which means *rightfully* demanded; and if a plaintiff sues elsewhere, and recovers less than 5*l.*, he will not be entitled to his costs.

COLERIDGE, Serjt., obtained a rule *nisi* in this case for entering a suggestion on the roll to deprive the plaintiff of costs under the 3 *Geo. 3*, c. xix. and 47 *Geo. 3*, sess. 2, c. xxxix. s. 31, the *Bradford* Court of Requests Act. By sect. 18, persons residing within or without the jurisdiction of the Court, having any such debt as thereinbefore mentioned, or any debt or debts due or owing to or claimed or *demand*ed by such persons, and for which debt or debts they should *demand* any sum not exceeding 5*l.* from any person soever inhabiting, residing, or living within the jurisdiction of the Court, &c. are enabled to summon such debtor to appear before the said Court. By sect. 31, it is provided, "That if any action for any debt recoverable under this act in the said Court shall be commenced in any other Court soever, the plaintiff shall not, by reason of any verdict for him, have or be entitled to any costs soever; and if the verdict shall be given for the defendant, and the Judge shall certify that such debt ought to have been recovered in the said Court of Requests, then the defendant shall have double costs, with all legal remedies for recovering the same." In the present case, the action was brought for work and labour, &c. The

defendant pleaded the general issue, with notice of set-off. The plaintiff, by his particulars, claimed 5*l.* 10*s.* 9*d.*, and the defendant endeavoured to set off 3*l.* 17*s.* for a stove sold, and work and labour done. The cause was tried before *Gaselee, J.*, at the *Somerset* Lent Assizes, when, as there was conflicting evidence as to the value of the work, the Jury found a verdict for the plaintiff, damages 4*l.* 10*s.*, on an understanding that the defendant was to take back his stove. On these facts the rule *nisi* was obtained.

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Bompas, Serjt., and *Erle* shewed cause.—The amount of the debt “demanded” by the plaintiff, and not the amount recovered, was the criterion by which it was to be determined whether the action should be brought in the *Bradford* Court of Requests or not. The sum here *demanded* was more than 5*l.*, and, therefore, the plaintiff was not bound to bring his action in that Court. The cases of *Harsant v. Larkin* (a), *Horn v. Hughes* (b), and *Shaddick v. Bennett* (c) shewed, that if a plaintiff had a *bonâ fide* ground for claiming more than the restricted sum, the Court would not interfere. But, in those cases, *debts* only were mentioned, and not *claims*, as in the present statute.

LORD LYNTHURST, C. B.—This rule ought to be made absolute. The hardship which must necessarily result to plaintiffs who reside at a distance, and can only prove their debts by witnesses who are out of the jurisdiction, and therefore not amenable to the process of the local Courts, has always formed a prominent feature in arguments upon such questions. It was much pressed upon this Court in the case of *Graham v. Browne* (d), and was

(a) 3 B. & C. 257.

(b) 8 East, 347.

(c) 4 B. & C. 769.

(d) 2 C. & J. 327.

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there disposed of. There, the defendant resided within the jurisdiction of the *Bath* Court of Requests, and the plaintiff and his witnesses lived in *London*. At first we were disposed to admit the force of the argument against the exercise of a discretionary power, and inclined against the entry of a suggestion which might tend to defeat the ends of justice. However, we felt ourselves imperatively bound by the words of the statute, and the suggestion was entered. The same argument was pressed upon the Court of *King's Bench* in the case of *Baildon v. Pitter* (a), but the Judges of that Court considered themselves to be concluded by the words of the statute there relied on, and in like manner ordered a suggestion to be entered. The words of this statute are not essentially dissimilar from those which were relied upon in the cases to which I have alluded, and must receive a similar construction. If, after a verdict has been delivered for less than 5*l.*, it might still be canvassed whether, when the action was commenced, the plaintiff had a reasonable and probable cause for claiming a larger amount, it would involve in every such case a second investigation. But, it is said, that the plaintiff is, in this case, protected by the particular expressions which are used by the legislature, and that, as he demanded a sum exceeding 5*l.*, he could not sue in the local Court. The word "demand" in the statute, in my opinion, means a *rightful* demand, a demand which he was legally and justly entitled to make; and the jury have decided that the plaintiff had no rightful demand beyond the sum of 4*l.* 10*s.*, which they have awarded. It is unnecessary here to say, whether the verdict of the jury is to be taken in every case as the criterion of the debt justly due to the plaintiff, and which he might rightfully demand. In most cases, undoubtedly, it should decide the question. Circum-

(a) 3 B. & Ald. 210.

stances, such as are mentioned by Lord *Ellenborough* in the case of *Horn v. Hughes*, may occur to influence the Court in their decision upon a question like the present. Here, however, the plaintiff's case did not miscarry in consequence of the absence of a material witness; but, upon a conflict of testimony, the jury decided that the plaintiff was only entitled to a sum under 5*l.*, which sum he could only *rightfully* demand.

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The other Barons concurred.

Rule absolute.

Michaelmas Term,

IN THE THIRD YEAR OF THE REIGN OF WILLIAM IV.

DOUBLE *v.* GIBBS.

COMYN shewed cause against a rule which had been obtained by *Bompas*, Serjt., calling on the plaintiff to shew cause why a suggestion should not be entered on the roll to deprive him of costs, having recovered less than 5*l.* in an action brought in this Court. This application was made under the authority of the *London Court of Requests' Acts*. The 3 Jac. 1, c. 15, which takes away costs where a defendant who ought to be tried in the Court of Requests is sued in the superior Court, describes the persons liable to be

The master of a vessel trading between *London* and *Rotterdam*, having no place of business in the city, but occasionally transacting a little business at the quay where his vessel is moored, and having a place of residence in *Southwark*, is not a person seeking

his livelihood or having dealings or transactions in *London* within the meaning of the *London Court of Request Acts*, 3 Jac. 1, c. 15, and 14 Geo. 2, c. 10.

Semble, that an action for use and occupation is not within the 39 & 40 Geo. 3, c. civ.

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sued in the inferior Court thus—"Any citizen and freeman of the city of *London*, or any other person being a victualler, tradesman, or labouring man inhabiting within the said city or the liberties thereof." The words of the 14 *Geo.* 2, c. 10, extended the class of persons liable, the words are—"Every citizen and freeman of the city of *London*, and every other person and persons inhabiting within the said city or its liberties, and also persons renting or keeping any shop, shed, stall, or stand, or seeking a livelihood there." And the last act of 39 & 40 *Geo.* 3, c. civ, describes the persons liable to be sued as "residing or inhabiting within the said city or its liberties, or keeping any house, warehouse, shop, shed, stall, or stand, or seeking a livelihood, or trading or dealing within the same city or liberties." But in the 3 *Jac.* 1, c. 15, there is an exception or proviso which enacts, that that act shall not extend to "any debt for rent upon any lease of lands or tenements or any other real contracts." In the declaration, there is a count for use and occupation, and, therefore, this case falls within the exception, according to *Woolley v. Cloutman* (a) and *Holden v. Newman* (b), in which it was held, that that clause extended to an action for use and occupation. He also cited *Tidd* (c).

Bompas, Serjt., cited the exception as stated in the 39 & 40 *Geo.* 3, c. civ. "that this act shall not extend to any debt where any title of freehold or lease for years of any lands or tenements shall come in question."

And the Court expressing an opinion that this did not include an action for use and occupation, *Comyn* proceeded with the facts.

Upon the other point, with respect to the defendant's re-

(a) Doug. 244. (b) 13 East, 161. (c) Page 958, 9th ed.

sidence and business, the affidavits are contradictory. The defendant says, that, at the time of the service, he was at *Brewer's Quay, Lower Thames Street*, seeking his livelihood there within the city; that he has before been summoned to the *London Court of Requests*; that the plaintiff knew he was trading and dealing at *Brewer's Quay* aforesaid, and that he recovered only 4*l.* 8*s.*; that he, the defendant, has been continually a trader at *Brewer's Quay*, and has bought furniture, meat, fruit, &c. there for eight years, and within that time has taken a ship to *Rotterdam*, and provided the men with provisions at a certain sum *per day*. My affidavits deny that the plaintiff knew of the defendant's dealings at *Brewer's Quay*, or that the defendant had any such dealings. On the contrary, it is sworn that the defendant has, for some years past, resided in *Southwark*; that he has no counting-house at *Brewer's Quay*, and that the counting-house and buildings at *Brewer's Quay* are in the possession and occupation of *Joseph Barker* as lessee; that the defendant has, for the last five years been employed by Messrs. *Capper* as the master of a vessel going to and from *Rotterdam*; that he comes to the *Quay* to unload: that the defendant is never more than twenty-eight days in a year alongside the quay; that after the vessel is discharged, it is moored into a dock in the county of *Middlesex*, until the defendant is ready to go to sea again. The defendant's affidavit states that he sells and buys; but the evidence is the other way: our affidavits shew that he was dismissed by Messrs. *Cappers* out of their service last *October*, and the execution had issued before. [*Bayley, B.*—Does he get his whole livelihood in *London*?] It is not stated where he gets his whole livelihood: but if he gains his livelihood in *London*, and lives in another place, he is not within the act. *Stevens v. Derry (a)*, *Holden v. New-*

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(a) 16 East, 147.

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man (a). He also cited 5 *Esp.* 19; 8 *East*, 336; *Skinner v. Davis* (b); and *Kensett v. West* (c).

Bompas, Serjt., in support of the rule.—All the livelihood the defendant gets is at *London*; he buys and sells there, the transaction arose there, it is his sole place of business, he has a *locum standi* there. [*Bolland*, B.—Is there any case in which the party did not lodge?] *Croft v. Pitman* (d). [*Bayley*, B.—In that case the defendant had a place for carrying on his business.] That is not mentioned in the act. The words are—"seeking a livelihood, or trading or dealing within the city." [*Comyn*.—In *Stevens v. Derry* it was held, that that meant his *whole* livelihood.] There is a case of *Bushnell v. Levi* (e), of a sheriff's officer in *Fetter Lane*, who carried on business in *Middlesex*, but had also an office in *London*, and was held to seek his livelihood in *London*. [*Lord Lyndhurst*, C. B.—There, he had a place to carry on his business in *London*. *Bayley*, B.—Is every master of a coasting vessel, constantly coming to the same wharf, to be within the act?] How can the Court get over the words in the act "trading or dealing within the city." The cases of *Fleming v. Davis* (f) and *Croft v. Pitman* (d) are in point. [*Comyn* cited *Reeves v. Stroud* (g) as at variance with *Fleming v. Davis*. *Lord Lyndhurst*, C. B.—*Taunton*, J., there says, "he has only a counting-house within the city.]

Per Curiam.—The defendant has no residence within the city: and though he speaks of a trading, and buying and selling, it is consistent with his affidavits that he buys

(a) 13 *East*, 161.

(b) 2 *Taunt.* 196.

(c) 5 *D. & R.* 626.

(d) 5 *Taunt.* 648.

(e) 2 *Moore & Payne*, 577; *S. C.* 5 *Bing.* 315.

(f) 5 *D. & R.* 372.

(g) 1 *Dowl. P. C.* 399.

and sells on account of his master. This is the case of a person going between *London* and *Rotterdam* bringing here things to sell: he stays here a short time: he is on the *Thames* in his vessel, which is moored alongside the quay. The statute ought to have a reasonable construction: that contended for by the defendant would enable parties to commit gross frauds.

Rule discharged.

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WOOD and Another v. CRITCHFIELD.

TURNER, on a former day in this term, had obtained a rule, calling upon the plaintiff to shew cause why the bail-bond should not be set aside and proceedings staid, on the ground of irregularity, with costs; the irregularity being, that, this being a country action, the name and residence of the country attorney were not indorsed on the copy of the summons, but only the name of the *London* attorney, and the amount of debt and costs was not stated.

If an imperfect copy of a rule is served, the party served must appear to it, and by such appearance he does not admit that he is properly brought into Court, so as to prevent him from taking the objection to the form of the copy of the rule.

Milner, who shewed cause, objected that the copy of the rule served on the plaintiff was not intitled in the cause.

BAYLEY, B.—They will serve you *de novo*.

Turner, contra.—The original rule is right. If the copy is bad, the plaintiff ought not to have appeared here; he is not in Court.

LORD LYNTHURST, C. B.—He is bound to come here in order to oppose.

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Turner.—If the other side appears, I always understood it amounted to a waiver.

BAYLEY, B.—No; they only appear to take the objection.

It was ultimately agreed that the bail bond should be delivered up, that the plaintiff should deliver a minute of the debt and costs, and not declare for six days.

FISHER and Another v. BEGREZ.

Although an ambassador's servant may be privileged as to his person, it does not follow that all his goods are privileged also, so as to enable the sheriff to apply to set aside a *fi. fa.* issued against them: and a clear case of privilege must be made out to the satisfaction of the Court, or else they will not interfere either on behalf of the sheriff or the person privileged. *Quere* whether a chorister, who merely officiates at a chapel where a foreign ambassador attends

divine service, is privileged as being the servant of an ambassador.

When application is to be made for relief or indulgence, it ought to be made without delay.

FOLLETT shewed cause against a rule, obtained by *Holt* on a former day, calling on the plaintiffs to shew cause, why the writ of *feri facias*, issued in this cause against the goods of the defendant, should not be quashed, on the ground of the defendant being a privileged person. This application is made on behalf of the sheriff: and the affidavit of the sheriff's officer states, that, after he had received the writ, he found that the defendant's name was in the list of privileged persons returned by the Secretary of State, and put up in the sheriff's office; that no indemnity has been given; that the defendant is not a trader; that he is *bond fide* attached to the *Bavarian* embassy; that he acts as chorister in the *Bavarian* chapel, and is in the suite of the *Bavarian* ambassador; and that, in the list of persons in the *Bavarian* embassy sent to the sheriff in 1828, and annexed hereto, the name of the defendant is specified.

The affidavits in answer state that the defendant is not a *Bavarian* subject, nor a native of *Bavaria*, but of *France*; that he came here in 1814; that he has been a public singer and teacher of music; that he composes and sells music, and the name of Signor *Begrex* is put to his compositions; that he is not a domestic servant, nor is he described as doing any domestic service. The *Bavarian* chapel is in *Warwick Street, Golden Square*, and is not in the house of the *Bavarian* minister, nor attached to it: the ambassador lives at No. 64, *Queen Ann Street*.

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Holt.—My affidavit states that he is in the habit of performing as chorister, and performed the *Sunday* before.

Follett.—The *Bavarian* minister knows nothing about him, and refuses to give any information about him. There is no pretence for the sheriff to come here, to have this writ quashed. The defendant is not within the statute. The 7 Anne, c. 42, s. 3, enacts, “that all writs and processes against the person or goods of an ambassador, or other public minister of a foreign prince or state, or the *domestic servant* of such ambassador or public minister, shall be utterly null and void.”

In the first place, the defendant is not a domestic servant; and secondly, if he were, the statute does not extend to protect all persons, even domestic servants, without shewing what their duties are, and what the ambassador has to do with them. After the passing of the statute of Queen Anne, persons residing here got themselves put down in the list of persons to be protected: most of them were attached to the *Bavarian* ambassador, who made a profit by it.

BAYLEY, B., to *Holt*.—You must not only be privileged, but privileged as to the goods.

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Follett.—If a person is *bond fide* attached to an embassy, and receives a salary, he may be protected, though he does not lie in the house, as was decided in *Evans v. Higgs* (a); that was the case of a secretary to an ambassador, but it was there sworn, that the nature of his employment required his attendance at the house; and in *Widmore v. Alvares* (b), it was expressly held that there must be some actual service at the house; here there is no service whatever at the house, nor does the defendant reside there; whatever service there is, is at the chapel. So in *Seacomb v. Bowlney* (c), it was held that a chaplain to a resident ambassador was not protected, because it was not shewn that he did any duty in the house. In *Triquet v. Bath* (d), actual attendance and actual service at the ambassador's house were expressly sworn to; and Lord Mansfield held, that though every particular act of service need not be specified in the affidavit, yet actual *bond fide* service must be proved. The affidavits here do not shew a *bond fide* service, and the fact of the name being in the list in the sheriff's office, is no reason for the sheriff not returning the writ, if it can be shewn that the appointment is not *bond fide*, but merely colourable: as in *Delvalle v. Plomer* (e), where, in an action against a sheriff for a false return of *nulla bona* to a writ of *fi. fa.*, Lord Ellenborough held, that though the name of the person against whom the writ issued, was in the list of persons stuck up in the sheriff's office, intimating that she was a domestic servant of the Hessian minister, and had a written appointment as housekeeper, the sheriff was bound to ascertain whether she was really a servant; and that if she was not, the appointment and notice were mere nullities. *Novello v. Toogood* (f), is an authority against the application; it was there held, that where the servant of an ambassador did

(a) 2 Str. 797.

(b) Fitz. 200.

(c) 1 Wils. 20.

(d) 3 Burr. 1478.

(e) 3 Campb. 47.

(f) 1 B. & C. 554; 2 D. & R. 833.

not reside in his master's house, but rented and lived in another, part of which he let in lodgings, his goods in that house, not being necessary for the convenience of the ambassador, were liable to be distrained for poor rates. That case is consistent with all the authorities; but a servant is not protected if he trades: Signor *Begrex* has been, ever since 1814, teaching and selling music, and it is not shewn that the defendant has no goods liable to be taken but what are necessary for the convenience of the ambassador.

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BAYLEY, B.—Do you find any instance of the sheriff being exonerated from returning the writ.

Follett.—Yes, where defendant has been arrested; but not in a case like this.

Holt, in support of the rule.—All cases must be decided with reference to the principle and policy of the statute of Anne. It is a part of our national law. In *Novello v. Toogood*, it was admitted to extend to *all* domestic servants.

BAYLEY, B.—It is not stated that the defendant is a servant of the *Bavarian* minister, and employed by him in the chapel.

Holt.—The sheriff finds the name of *Begrex* in the list of privileged persons; how can it be said that he is bound to make inquiries; if the sheriff were to proceed he might subject himself to an action.

GURNEY, B.—The act does not protect *all* goods. The sheriff now comes and says, that he has not taken the goods because the defendant is servant to an ambassador. You do not say he is not a trader; all you say is, you have made inquiries, and believe he is no trader.

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BAYLEY, B.—There must be many people in the habit of attending the chapel, who could say whether they have seen the defendant there. You only say he officiated last Sunday.

Holt.—If he was a chorister in 1828, it is sufficient for me. The ambassador and the secretary of state certify that he is exempt as chorister. The sheriff is not bound to make inquiries whether he is so, and how often he has officiated. The statute certainly says, that no merchant or trader shall take advantage of the act; but the sheriff inquired, and was told he was not a trader. *Mr. Begrex* is at this time attached to the embassy. The first point therefore is made out, that the defendant is a chorister in actual service; more strictness may be required where the person himself applies, than where the sheriff applies: the distinction is important. Collusion is not imputed. Secondly, it is said to be a qualified power in the act; that the description of the goods is not shewn; that we might have levied on other goods, and left sufficient for the service of the defendant as chorister: but no distinction has ever been made between the goods and the person.

BAYLEY, B.—We are all of opinion against you on the first point. You apply for indulgence; for you are bound to make a return. The writ is directed to the sheriff, and the strict rule of law is, that he ought to make a return when called on: he has neglected to do so. The sheriff may ask for indulgence to quash the writ, and supersede any liability, and so stop proceedings *in limine*; and if he shews sufficient to satisfy the Court they ought to do so, no doubt they would, but if there is not sufficient, the sheriff must make his return. Why does the sheriff ask to have the writ quashed? The statute speaks of ambassadors and domestic servants; but the name must also be in a list in the sheriff's office, to make the sheriff answerable. That

comes in by way of proviso, where it appears the sheriff would do wrong in executing the writ, that is, as to ambassadors and domestic servants, but he must satisfy the Court that the defendant is a domestic servant. It is not necessary he should live in the house: but it is not made out that he is part of the suite of the *Bavarian* minister. I do not allude now to the privilege of person as distinguished from goods—we do not enter into that. Lord *Palmerston*, in *June*, 1821, puts the defendant's name in the list: that only ascertains that *Begrex* was at that time a domestic servant of the *Bavarian* minister; whether he remained so in 1832 is another question, and must be ascertained by other means. The sheriff who applies in this extraordinary way ought to satisfy us, that he really is attached to the *Bavarian* embassy, and not raise a mere inference. The affidavits are meagre in the extreme. No inquiry appears to have been made of the servants of the *Bavarian* minister, or of the persons attending the chapel: it is stated that *Begrex* is *bonâ fide* attached to the *Bavarian* embassy; but not *how* attached: he may have been attached, and yet not so as to prevent an officer from executing process.

VAUGHAN, B.—A writ of execution comes into the hands of the sheriff on the 15th of *June*. He applies here on the ground of process being directed against a domestic servant of an ambassador, whose goods are about to be distrained; he desires in fact to be absolved from returning all process of this nature. The statute of *Anne* may be considered as declaratory of the law of nations, rather than as enacting any new law. The sheriff had been ruled, on the 2nd day of *November*, to return the writ; he does nothing till the 12th, and then he makes this application: he ought to have applied earlier. The only duty the sheriff speaks to is on the 4th, two days after the rule was obtained, when he says he believes he officiated. The question is, whether we are to interfere. The sheriff is bound to sa-

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tisfy us, so as to leave no doubt that the defendant is a servant, and that the application is made *bond fide*.

BOLLAND, B.—It is not necessary for us to decide whether a chorister is protected. I have a strong opinion that he is. The word “domestic” ought, as in the case in *Burrows*, not to be confined but extended. If it is a chapel attached to the embassy, and the facts were brought home, I should think he ought to be protected.

No great reliance can be placed on the list: for I find there the name of a person who is a clerk in the Long Room at the *Custom House*; he holds incompatible offices; he has one duty to perform to the ambassador and another to the public.

GURNEY, B.—concurred.

Rule discharged, with costs.

LATHAM v. HIDE.

HIDE v. LATHAM.

If an attorney practise in a Court in which he has not been admitted, he cannot maintain an action for his fees, nor even for money out of pocket; neither has he any lien for his costs or for money disbursed; and therefore he cannot prevent the damages and costs in one action being set off against those in another, though his costs have not been paid.

COLTMAN, on a former day, had obtained a rule on the part of the plaintiff in one of the above actions and the defendant in the other, calling on the opposite party to shew cause why the damages and costs in one action should not be set off against the damages and costs in the other, without allowing the costs of the attorney for one of the parties, who was not an attorney of this Court.

Wightman now shewed cause.—The only question in this case is respecting the attorney’s lien, and it is objected, that, not being an attorney of this Court, he can have no lien: but this is not like the case of an attorney suing his client, as in *Vincent v. Holt (a)*; and that case is incon-

(a) 4 Taunt. 452.

sistent with a previous case of *Meadowcroft v. Holman* (a). The rule does not apply to cases of set off. It is admitted that in general costs may be set off; but the lien which exists between him and his client must first be satisfied.

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BAYLEY, B.—The question is, whether the attorney has any lien.

Wightman.—Yes; he would have a lien for money out of pocket. It is only for profit that he cannot recover.

LORD LYNDEHURST, C. B.—What authority is there to that effect?

Wightman.—There is no authority either for me or against me.

BAYLEY, B.—He might have proceeded in the name of an attorney of this Court. If a regular attorney does not deliver a bill, he cannot recover even money out of pocket.

LORD LYNDEHURST, C. B.—He has no right to conduct the cause. The money laid out is laid out in the cause. How can you maintain your proposition? The money is laid out in doing that which the law does not allow. Suppose we were of opinion he could recover nothing?

Wightman.—The plaintiff can recover his costs, and they would form an item of set off. They say that the bills when taxed would be set aside, and the attorney could not appear; but this Court will not interfere summarily to prevent an attorney having his lien.

Coltman and Tomlinson, contra.—A special privilege is

(a) 1 H. Blac. 50.

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given in respect of his character of attorney. He clearly could not sue his client. *Vincent v. Holt (a)*.

BAYLEY, B.—On a late occasion the Court doubted whether that was rightly decided.

Coltman.—The attorney was acting in direct contravention of the 2 Geo. 2 (b), which expressly enacts, that no person shall act as an attorney unless he is sworn, admitted, and enrolled, in the Court in which he practises as an attorney.—He was then stopped.

LORD LYNTHURST, C. B.—An attorney cannot act in this Court unless he is entered in this Court: and as he cannot sue, he cannot have a lien; and therefore the set off must be as prayed.

BAYLEY, B.—There is an exception of his using the name of another attorney.

Rule absolute (c).

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| (a) 4 Taunt. 452. | 102; <i>Thwaites v. Mackinson</i> , 1 M. |
| (b) 2 Geo. 2, c. 23, s. 1. | & M. 199; <i>Heming v. Baxter</i> , Id. |
| (c) See <i>Miller v. Towers, Peake</i> , | 529; and see 2 M. & M. 33. |

WARD's Bail.

Nov. 12th.
 Notice of bail, describing the bail to have resided within the last six months (instead of for the last six months) at a particular place, is bad; but if the affidavit of justification is correct, it may be connected with the notice, so as to make the notice sufficient.

UPON bail coming up to justify by affidavit, *Butt* objected that the notice of bail was bad. It stated that one of the bail had, *within* the last six months, resided, &c., instead of "*for* the last six months," as given in the printed form. It might be that the bail had only been one day at that place during the last six months.

Comyn, contra, cited a case of *Fenton v. Warre* (a), where it was held, that it was not necessary to state in the notice where the bail has resided for the last six months.

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Butt said, that there was a contrary decision in the *King's Bench*, in a case before *Taunton, J.* (b), and in a subsequent case in the *Exchequer*, where *Vaughan, B.*, said that the decision of the *King's Bench* should be adopted in this Court.

GURNEY, B.—The words of the rule of *Trinity Term*, 1 *Will.* 4, rule 2, are express, that “ every notice of bail shall, in addition to the descriptions of the bail, mention the streets, &c., in which each of the bail has been resident within the last six months.” You must give the residence for six months.

Upon looking at the affidavit of justification, it appeared to be correct; the bail having there expressly sworn in the words of the rule; and *Gurney, B.*, said, he thought the notice connected with the affidavit was sufficient. His lordship consulted on the point with the other Barons, and on his return stated, they were of opinion, that, taking the notice and affidavit together, the residence was sufficiently stated.

Bail allowed—No costs (c).

(a) 2 Crompt. & Jer. 54.

(b) *Anonymous*, ante, p. 160.

(c) See the case of *Higgs's bail*, ante, p. 124, that the notice of justification is sufficient, without stat-

ing the residence of the bail, if it has been stated in the notice of bail. And see, also, *Jervis's Rules*, 2nd. ed. p. 29, n. (k).

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CONSTABLE v. JOHNSON.

If an attorney acts in a Court of which he is not admitted, proceedings will be staid, and he will be ordered to pay the costs; and it is not too late to apply even after issue joined and notice of trial given.

KELLY shewed cause against a rule for setting aside proceedings, on the ground that the plaintiff's attorney did not appear to be an attorney of this Court. He contended that the motion was too late after issue joined and notice of trial. The attorney swears, he is an attorney of *K. B.* and *C. P.*, and is also a solicitor in *Chancery*; and that, from inquiries made of the officers of this Court, he understood, that, having been admitted of the Court of *Chancery*, he could practise in this Court.

Lord LYNDHURST, C. B.—Proceedings must be staid till another attorney is appointed, and the attorney must pay the costs of this motion.

Knowles, contra, urged, that the proceedings were altogether irregular, and that there was no attorney's name indorsed on the process.

BAYLEY, B.—Yes; there is, though not of this Court.

Rule absolute.

BADDLEY v. OLIVER.

Where a Judge at the assizes, in pursuance of the provisions of the 1 *Will. 4*,

c. 7, orders that the plaintiff shall have execution within a limited time, and judgment is thereupon entered up and execution issued, the defendant is not precluded from applying in the next term to the Court above, to enter a suggestion to deprive the plaintiff of costs.

A Judge at the assizes has no power to order such a suggestion to be entered.

It is the sum which the plaintiff ultimately recovers, and not the sum which the plaintiff claims to be due, which is to decide whether the plaintiff ought to have sued in the Court of Conscience, or in the superior Court.

Where two parties come to an arrangement and one is ignorant of his rights, the agreement is not in general binding upon him.

should not be at liberty to enter a suggestion on the roll to deprive the plaintiff of costs, in pursuance of the provisions of the 47 Geo. 3, c. 36, s. 12, (local and personal), for establishing a local court at *Overing*, in *Staffordshire*, for the recovery of debts not exceeding 5*l.*; and which provided, that if an action should be commenced in any other Court for a debt recoverable in the local court, the plaintiff should not be entitled to any costs; and also, for returning to the defendant the amount of the plaintiff's costs, which had been levied upon the defendant.

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V. Richards and Follett, now shewed cause, on three grounds.—*First*, This case does not come within the act; *Secondly*, The parties have arranged between themselves so as to prevent this Court from interposing; and, *Thirdly*, This Court has no power to order a suggestion to be entered. This action was brought to recover money due as the balance of an unliquidated amount. It came on to be tried at the *Stafford Assizes*, in *July* last, and was referred to Mr. *Strutt*, who ordered a verdict to be entered for the plaintiff, for 1*l.* 9*s.* 1*d.* It had been agreed, that the plaintiff was not to be delayed, if there was a verdict for him; and *Hunt*, the defendant's attorney, signed a written consent, that the Judge should certify that the plaintiff might issue execution within one month. The affidavits shew, that the action was originally brought for the sum of 13*l.* 2*s.* 4*d.*; and that was the sum claimed on the copy of the writ. The words of the act are, "if any action shall be commenced for any debt under 5*l.*, the plaintiff shall have no costs." This action was, therefore, commenced for a sum not within the cognizance of the Court of Requests. The defendant claimed to set off a sum of 7*l.* 12*s.* Both sums were reduced by the arbitrator: the plaintiff's to 4*l.* 1*s.* 1*d.*, the defendant's to 2*l.* 12*s.*; and the difference of those two sums was the sum of 1*l.* 9*s.* 1*d.*, for which the arbitrator ordered a verdict to be entered for the plaintiff.

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But, the accounts were confused and complicated; and a letter of the defendant's attorney expressly says—"the accounts are so complicated, a jury will never get to the end of them." There is also the positive oath of the plaintiff, that more than 12*l.* was due to him. It would be very hard, therefore, that a plaintiff, who *bond fide* sues for a debt which he believes to be due, should be liable to be deprived of his costs, because, from some cause over which he may have no control, he cannot substantiate it to its full extent. These acts do not apply where the sum claimed is reduced by cross demands.

BAYLEY, B.—You are to consider the demand, not according to what you claim, but to what you prove. That has been expressly held in *Shaddick v. Bennett* (a). Your affidavits do not specify any items to shew that more than 5*l.* was due.

V. Richards.—The plaintiff's affidavit expressly states that more is due; and the defendant's does not contradict it, but merely states what the arbitrator found. But, *secondly*, this application is against good faith. Both parties consulted together, and it was agreed to refer the cause; and, that the Judge should certify for the plaintiff for execution in a month. Both parties ought to be concluded by this arrangement; and, even supposing both were ignorant of the provision respecting costs in the local act, it is too late now for one party to take advantage of it. The defendant first applied to the arbitrator; but, he declined to make any order about costs, as they were not referred to him. An application was then made to Mr. Justice *Bosanquet*, who tried the cause, to rescind the certificate for immediate execution: on that occasion the local act was brought expressly before him, and both parties were heard upon full affidavits; but,

(a) 4 Barn. & Cres. 769.

the learned Judge decided, that execution should go; that could only be on the assumption that the act did not apply to this case; and that was the learned Judge's opinion after deliberation. No application was made to him for leave to enter a suggestion.

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BAYLEY, B.—What authority had Mr. Justice *Bosanquet* to enter a suggestion?

Follett.—The whole matter was referred to him: a consent was given to an immediate execution; execution did accordingly issue, and the money is in the hands of the sheriff. If his lordship had no power to enter a suggestion, he had the power of preventing the defendant from coming here now, by allowing the plaintiff to get judgment forthwith, which he would not have done, unless he thought the defendant was not entitled to relief under the local act; and, therefore, the defendant is now too late, for the defendant cannot apply to enter a suggestion after final judgment. That was the rule before the statute of 1 *Will.* 4, c. 7, and is laid down in 2 *Tidd*, 961 (a): under the second section of that act, the Judge at *Nisi Prius* has clearly jurisdiction to determine, under all the circumstances, when the plaintiff should have judgment (b). The defendant applied to him

(a) Citing *Barney v. Tubb*, 2 H. Bla. 345; *Dunstan v. Day*, 8 East, 239; and *Calvert v. Everard*, 5 M. & S. 510. See, also, *Hippesley v. Laing*, 4 B. & C. 863, where it was held, that if the motion might have been made in Easter Term, it was too late to make it in Trinity Term, though final judgment was not signed.

(b) The 1 W. 4, c. 7, s. 2, enacts, that, in all actions, it shall be lawful for the Judge before whom any issue joined in such action shall be

to be tried, in case the plaintiff or demandant therein shall become nonsuit, or a verdict shall be given for the plaintiff or demandant, defendant or tenant, to certify under his hand, on the back of the record, at any time before the end of the sittings or assizes, that in his opinion execution ought to issue in such action forthwith, or, at some day to be named in such certificate, and subject or not to any condition or qualification; and, in case of a verdict for the plain-

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to stay final judgment till this application was made. Mr. Justice *Bosanquet* entertained that application with reference to the *Overing* Court of Requests act, and he decided that he has no authority to prevent the plaintiff from having judgment. As soon as judgment is signed, this application cannot be made, for this is not an application under the 4th section of the act, but under the old law. The 4th section does not authorize this motion, it only says—"Provided always, that notwithstanding any judgment signed or recorded, or execution issued by virtue of this act, it shall be lawful for the Court in which the action shall have been brought, to order such judgment to be vacated, and execution to be stayed or set aside, and to enter an arrest of judgment, or grant a new trial, or new writ of inquiry, as justice may appear to require; and, thereupon, the party affected by such writ of execution shall be restored to all that he may have lost thereby, in such manner as upon the reversal of a judgment by writ of error, or otherwise, as the Court may think fit to direct." This Court, therefore, has no power to order a suggestion to be entered, for the defendant is too late in his application.

Campbell, in support of the rule.—With respect to the first point, the finding of the Jury is what the Courts have been always bound by. If the verdict stands, it is conclusive. The plaintiff should have moved to set aside the

tiff, then either for the whole, or for any part of the sum found by such verdict; in all which cases a rule for judgment may be given, costs taxed, and judgment signed forthwith; and execution may be issued forthwith or afterwards, according to the terms of such certificate, on any day in vacation or term; and the *postea*, with such certificate as a part thereof, shall

and may be entered of record as of the day on which the judgment shall be signed, although the writ of *distringas juratores*, or *habeas corpora juratorum*, may not be returnable until after such day: provided always, that it shall be lawful for the party entitled to such judgment to postpone the signing thereof.

verdict. As to the act of 1 *Will. 4*, that statute was not intended to repeal all the Court of Conscience Acts, or to put it in the power of a single Judge to prevent the defendant from getting the benefit of them. The defendant can apply in the same term. The fourth section is in general terms, and says, that the judgment may be vacated. This Court has power to order a suggestion to be entered. (He was then stopped by the Court).

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BAYLEY, B.—I am of opinion, that this rule for entering a suggestion ought to be made absolute. The words of the local act are, that if any action for any debt under 5*l.* shall be commenced in any other Court, the plaintiff, though he get a verdict, shall not have costs. That act authorizes suits for 5*l.*: here the verdict is only for 1*l.* 9*s.* 1*d.*; it was reduced to that sum by a set-off, the original sum being 4*l.* 1*s.* 1*d.* It has been held, and acted upon in this Court, that the verdict is to be taken as the amount, otherwise we should have contradictory affidavits (*a*). But, it is said,

(*a*) There are many authorities to this effect: *Weston v. Donnelly*, Sayer, 273; *Horn v. Hughes*, 8 East, 346; *Fomin v. Oswell*, 1 M. & S. 393; *Jordan v. Strong*, 5 M. & S. 169; *Shaddick v. Bennett*, 4 B. & C. 769; *Clark v. Askeu*, 8 East, 28; *Fountain v. Young*, 1 Taunt. 60; *Benson v. Heming*, Barnes, 353; *Porter v. Philpot*, 14 East, 343; *Butler v. Grubb*, Imp. K. B., 560, 3rd ed. B. R.; *Rothery v. Munnings*, 1 B. & Ad. 18, n. (*a*). (*Harasant v. Larkin*, 1 Brod. & B. 257, is *contra*.) These are cases where, as in the principal case, the sum really due is found by verdict (independently of any set-off or tender), to be under the sum cognizable by the inferior court. And it makes

no difference that the plaintiff's claim is reduced by the absence of a witness. *Fitzpatrick v. Pickering*, 2 Wils. 68; or, where, as in *Rothery v. Munnings*, the plaintiff's bill, (which was for 260*l.*), was reduced by the statute of limitations being held to apply to all except 1*l.*, the rule being as stated by Bayley, B., *infra*, that the plaintiff's real claim is ascertained by what he *proves* to be due; but, where the claim is reduced by a set-off, (*Pitts v. Carpenter*, 2 Str. 1191, 1 Wils. 19, S. C.; *Gross v. Fisher*, 3 Wils. 48); or by plea of tender, (*Heaward v. Hopkins*, Doug. 448; *Waistell v. Atkinson*, 3 Bing. 289), to a sum below the amount recoverable in the inferior court,

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that the defendant is precluded by two circumstances:—
First, That he originally agreed that execution should issue on a day in *August* last; but he was not probably aware at that time of the provisions of the local act. If a man knows his rights, and with full knowledge acts, he is bound; but, it would be too much to say, that the defendant is concluded by that agreement. The *second* objection is, that Mr. Justice *Bosanquet* has already decided upon this matter; because he would not have let execution issue, if the local act had exonerated the defendant from costs. Was that within his jurisdiction? If you had referred to an arbitrator, he would have had power to decide upon the point; and, even if he were wrong, both parties would be bound by his decision: but, to a Judge you refer in his judicial character; and, therefore, if he did decide on an erroneous supposition that the act did not apply, we are not bound, and cannot be fettered. His was not the proper tribunal. But, it is said, he having made an order, they who have suffered that order to stand, are now too late to enter a suggestion; but I cannot put that construction on the act of 1 *Will.* 4, c. 7. What was the evil before that act? Till that act, the plaintiff was prevented from having execution till after the first four days of the next term. Then the defendant had only four days to enter a suggestion, and it must have been made within that time: but, here, the defendant has come at the earliest time to the only Court that could act; and this Court can give him the relief which he prays, notwithstanding the 4th section of 1 *Will.* 4, c. 7, does not mention any thing about entering a suggestion; for, the things specified in that section are only put as instances.

the defendant cannot have a suggestion. But the mere fact of pleading a tender is no waiver by the defendant of the benefit of the act, nor does it preclude him from

having a suggestion, where the sum recovered and the sum tendered do not together exceed the sum suable in the inferior Court. *Jordan v. Strong*, 5 M. & S. 196.

BOLLAND, B.—I think that the clause in the 1 *Will. 4*, c. 7, which has been relied on, is fully answered by the fact, that this motion was made within the first four days of this term.

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GURNEY, B.—The present appears to be a case within the meaning of the local act of the 47 *Geo. 3*; but, I do not say that the Court will not resort to other means than the verdict.

Rule absolute for entering a suggestion, and for returning the money, and no action to be brought.

SIMPSON'S Bail.

HUGHES opposed the bail in this case, on account of a defect in the affidavit of justification. The bail merely swore that they were *possessed* of a certain sum over and above their just debts. The expression in the rule (a), is "*worth*," which bears a very different meaning from the word possessed.

It is not sufficient for bail to swear that they are possessed of so much money over and above their just debts, but they must say that they are "*worth*" such sum.

GURNEY, B., held it a good objection. The bail might have property put into their hands for the mere purpose of enabling them to make the affidavit.

Busby, amicus curiæ, mentioned a case where all the Barons had been consulted, and they held the objection good.

Crompton, in support of the bail, proposed, that the bail should be examined as if there was no affidavit. But it appeared to be country bail; and the Court held that the

(a) R.H. 2 Will. 4, reg. 1, s. 19.

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objection was fatal, whether it was taken as an affidavit under the new rules or not.

The Court gave time to amend, but allowed the costs of opposition (a).

(a) See *Henshaw v. Woolwich*, 1 Crompt. & J. 150.

PERRY'S Bail.

An affidavit of justification may be sufficient if the rule of Court is substantially complied with, though in form it may not be exactly conformable with that given by the rule.

J. JERVIS objected to the affidavit of justification, that one of the bail merely stated, that "his property, to the amount of 300*l.*, consisted of bank notes," without going on to say, "over and above his just debts;" and the printed words in the form which immediately followed, namely, "and every other sum for which he is now bail," were struck out. He stated that there was good reason for omitting those words; for the affidavit in opposition stated, that upon search it was found that the bail had become bail in no less than four other actions. The affidavit was also wrongly intitled; it was, "in the *office* of Pleas," and no perjury can be assigned upon it.

Miller, contra, contended, that it clearly appeared from other parts of the affidavit, that the property was sufficient. He swears expressly that he is worth property to the amount of 300*l.*, over and above his just debts. It was not necessary to repeat that in the subsequent part of the affidavit.

GURNEY, B.—That is sufficient. But how can you get over their affidavit, which states, that you have become bail in four other actions?

Miller.—This is bail by affidavit. We have no means

of contradicting their affidavit, unless your lordship will allow us time to swear an affidavit in reply.

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GURNEY, B.—Certainly not. If they have sworn falsely, you may move again.

Bail rejected, with costs (a).

(a) See *Henshaw v. Woolrich*, 1 Crompt. & Jerv. 150.

WATSON v. WILLIAMSON.

ON shewing cause against a rule, one of the affidavits appeared to be sworn at *Lanark*, in *Scotland*, before a justice of the peace there.

It is no objection to an affidavit sworn in *Scotland*, that it is taken before a justice of the peace, and not before a lord of Session.

Platt objected to it on that ground; contending, that it ought to have been sworn before a lord of Session; but—

Per Curiam.—It is quite sufficient. Affidavits are often sworn so.

WHALLEY v. BARNET.

J. JERVIS shewed cause against a rule for setting aside a judgment and subsequent proceedings for irregularity. The question was, whether the defendant was entitled to claim an imparlance upon rule 7, of *Reg. Gen., T. T., 1 Will. 4 (a)*. The writ and appearance were of *Hilary* Term. The declaration was of *Trinity* Term. An imparlance was claimed *June 15th*; it was disregarded, and judgment was signed *June 20th*. A summons had been taken out to set aside the proceedings, on the ground of an imparlance

Where the writ and declaration are of different terms, the defendant is entitled to an imparlance. An irregularity is not waived by agreeing to terms where the party is under a misapprehension, occasioned by the mistake of a Judge in point of law.

(a) See the rule, *ante*, p. 104.

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not having been granted. Mr. Baron *Vaughan* held that the defendant was not entitled to an imparlance. It is said to have been decided otherwise by Mr. Justice *Taunton* (a).

V. Richards.—And by this Court (b).

BAYLEY, B.—If the appearance was of a different term, it is clear that the defendant would have been entitled to an imparlance, if the declaration was delivered in the early part of *Trinity Term*.

J. Jervis.—The action was for 3*l.* 15*s.*; and, when the summons was heard before Baron *Vaughan*, who thought the judgment was regular, terms were offered, and a rule was drawn up to this effect, that the plaintiff's attorney should accept 3*l.* for the debt, with taxed costs. Time was given to consider. The rule was not served on the plaintiff, and a writ of inquiry was, therefore, executed: it does not appear when. On the 30th of *June*, notice was given that this Court would be moved to set aside proceedings. He submitted, therefore, that under these circumstances they came too late.

V. Richards, contra.—We did not consent to that order. (He was then stopped.)

LORD LYNTHURST, C. B.—Under these circumstances that order does not appear to be binding. It was done under a misapprehension, and after Mr. Baron *Vaughan*'s opinion delivered, which was wrong. I think the judgment was irregularly signed.

Rule absolute, with costs, and no action to be brought.

(a) See note (q), *Jervis's Rules*, (2nd ed.) p. 33.

(b) See *Edensor v. Hoffman*, 2 Crompt. & Jerv. 140.

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CREIGHTON'S Bail.

J. JERVIS opposed bail on the ground of irregularity. The notice was to put in and justify at the same time. The defendant was a prisoner; but the notice did not state that he was so. By the uniform practice of this Court, he contended that it must so appear. The reason is, that the rule for allowance is always drawn up, as well for the allowance of the bail as for the discharge of the prisoner, which it would not be, unless it appeared that the defendant was a prisoner.

In a notice of bail for a prisoner to justify at the time of putting in, it must appear that the defendant is a prisoner.

Platt, contrà, insisted that the rule for allowance of itself operated as a discharge, and was a perfect justification for the officer.

GURNEY, B., (after consulting with the Master), held the objection to be good, and that the common form of the rule for allowance was in the way suggested by *Mr. Jervis*.

Bail rejected.

NANNEY, Clerk, *v.* KENRICK.

THIS was an action for maliciously holding to bail. The declaration contained several counts, and was demurred to specially. The plaintiff having signed judgment for want of a plea, *Mansel* had obtained a rule to set it aside; against which—

Maule now shewed cause.—The defendant obtained time to plead on the usual terms. The demurrer is special, and the causes trivial, occupying several sheets of paper; we, therefore, signed judgment for want of a plea.

A demurrer, though trivial, cannot be treated as a nullity where the defendant is not under terms to plead issuably; but, if he is, he cannot demur specially; and where good grounds are stated, the Court will sometimes allow the special causes of demurrer to be struck out.

Mansel, in support of the rule.—It was competent for
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us to demur specially, if the grounds are fair and reasonable. He cited *Langford v. Waghorn* (a); that was trespass for entering plaintiff's apartments, to which the defendant pleaded a seisin in fee in one, and a demise by him to a third person; and, that the other defendant acted as his servant. The plaintiff replied *de injuriâ*; and the defendant demurred, assigning a special cause, that the replication traversed all the matters in the plea, instead of being confined to one only; and, this Court held, that, as it was a fair demurrer, the defendant, though under terms, was not precluded from pleading it.

BAYLEY, B.—A special demurrer is not an issuable plea: but, if there are good grounds, the Court will sometimes strike out the causes.

Mansel.—We do not admit being under terms.

Maule.—We swear, we consented to give time on the usual terms.

Mansel.—The rule is not drawn up so; and you are bound by the rule. But, after a rule to rejoin, it is too late to sign judgment. The demurrer was on *July 2nd*; they waited till this term, and then we gave a rule to rejoin.

BAYLEY, B.—If they are not under terms, the demurrer, though trivial, cannot be treated as a nullity; otherwise, if they are.

It was ultimately referred to the Master to ascertain at what time the words in the rule (which was produced) "on the usual terms," were struck out, and by whom.

(a) 7 Price, 670.

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DAVID MORGAN v. MARGARET MORGAN.

MAULE and **V. WILLIAMS** shewed cause against a rule for setting aside an award, on the ground of misconduct in the arbitrator. The action came on to be tried at the last *Car-marthen* Assizes, and was referred to a Mr. *Walter Wright*, who ordered a verdict for the plaintiff, for 58*l.* 7*s.* 8*d.* In the first place, it is said, that the arbitrator gave more than was claimed, we having in the first instance demanded only 50*l.*; but that we swear to have been a mistake. The action was brought on a note of hand for 50*l.*, and for 8*l.* 7*s.* 8*d.*, the balance of an unsettled account. The misconduct of the arbitrator is endeavoured to be established by alleging that he examined the plaintiff himself to prove his own case; and that the arbitrator was indebted to the plaintiff in a large sum of money, and had been so for some years; and that that fact was concealed from the defendant, who objected to the arbitration going on before Mr. *Wright*, unless at all events some one was joined with him. With respect to the plaintiff having been examined, it appears that the defendant was sued as administratrix with the will annexed. The handwriting of the intestate to the note was admitted; but she insisted it had been paid, and, under those circumstances, the arbitrator examined the plaintiff, who was the only person who could give him information about it. The only important objection to the arbitrator is, his being indebted to the plaintiff; and, that he is said to be in difficulties: but that of itself is not sufficient. It is true, there was a sum of money out at interest, in the plaintiff's hands; but, we swear, that we believe him to be a gentleman of property and integrity; and it might be the plaintiff's own wish, that the money should remain out at interest, instead of being paid. We also swear, that the arbitrator owed money to the defendant's mother. At all

The mere fact of an arbitrator being indebted to one of the parties is not of itself sufficient to set aside an award, though the other party was ignorant of the circumstance, and, as soon as he knew of it, objected to the arbitrator's proceeding.

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events, no case of corruption has been made out to induce this Court to interfere.

John Evans, contrà, endeavoured to support the rule.—He contended that the circumstance of the arbitrator being indebted ought not to have been concealed from the defendant, and that a case of strong suspicion had been made out. It was not necessary to shew actual corruption or undue motive (a). A witness for the defendant proved that the plaintiff had admitted the note to have been satisfied by commission due to the intestate on sales and otherwise. The plaintiff ought not to have been called to prove his own case. If we had been aware that the arbitrator had been under any pecuniary obligation, we should not have agreed to refer to him.

Per Curiam.—We think the arbitrator did right in examining the plaintiff. The handwriting was admitted. He was put upon his oath by the arbitrator, as to whether the money had been paid. That was more for the security of the defendant than for the plaintiff's benefit, for the note remaining in the plaintiff's hands, the presumption was, that it had not been satisfied. No case has gone the length of saying that an award can be set aside because the arbitrator was indebted to one of the parties. It is certainly a matter of suspicion, but it is not of itself sufficient; no corruption is shewn. The other objection has been explained. The rule must be discharged, but without costs.

Rule discharged, without costs.

(a) *Per Lord Hardwicke*, in *Sheppard v. Brand*, C. T. Hardw. 53.

1832.

DOE *d.* COLLINS *v.* ROE.

HUGHES applied for judgment against the casual ejector, on an affidavit of service on two tenants in possession, by delivering copies of the declaration to them, "and also on *R. Tyne*, whom this deponent has been informed and believes to be mortgagee in possession, by serving the same on *Mr. Butler*, whom this deponent believes to be *Mr. Tyne's* attorney, by giving the same to him at his office, who accepted the same for *Mr. Tyne*, and undertook to appear for him."

Service of declaration in ejectment on a person described as mortgagee in possession, by delivering it to his attorney, who undertook to appear for him, is not sufficient, without an acknowledgment by the mortgagee.

Per Curiam.—You do not swear to any acknowledgment by *Mr. Tyne*. It would be going further than we have gone yet. You may have your rule as far as regards the two tenants in possession, but not as to *Tyne*.

Rule accordingly.

KENNEDY *v.* Lord OXFORD.

COMYN moved to enter up judgment on a *scire facias*. The last writ was returnable three weeks from the *Holy Trinity*, in 1825, and a rule for appearance has been entered every term; but it is not sworn that notice has been given to the bail, according to sect. 81 of *R. H. 2 Will. 4*, r. 1.

Though two writs of *sci. fa.* on a judgment have been issued previously to the rule of *H. 2 W. 4*, which requires notice to be given to the bail, still judgment cannot be signed on such writs of *sci. fa.* without complying with that rule; and giving a rule for appearance is not sufficient.

BAYLEY, B.—Your rule for appearance is nothing. It is not served. We want to annihilate the practice of taking proceedings behind parties' backs. Here the judgment is seven or eight years old. Notice must be given to the bail.

Rule refused.

1832.

WILSON'S Bail.

Where proceedings have been taken on the bail-bond, before the bail come up to justify, the payment of those costs cannot be insisted on as a preliminary objection.

STEER opposed bail, on the ground that proceedings having been taken upon the bail-bond, the costs of those proceedings ought to have been paid before the bail were allowed to justify.

BAYLEY, B., said, that was no objection; for the proceedings on the bail-bond could only be staid upon payment of costs.

DOE *d.* SMITH *v.* ROE.

Service of a declaration in ejectment upon the mother of the tenant in possession is not sufficient.

JUDGMENT against the casual ejector was moved for in this case, on an affidavit, which stated the service to be by delivering the declaration on the premises to Mrs. *Smith*, who was either the wife or mother of the tenant in possession.

BAYLEY, B.—That is not sufficient. If it was the wife who was served it would do; but not if the mother.

Rule refused (*a*).

(*a*) See *Doe d. Walker v. Roe*, 4 Moore & Payne, 11, where service of a copy of a declaration and notice on a woman upon the premises, who represented herself to be the wife of the tenant in possession, was held sufficient.

ALIVEN *v.* FURNIVAL.

After an arrest in a foreign country upon a judgment obtained there, the defendant, having escaped, may be again arrested here in an action on that judgment.

CARRINGTON applied to the Court for the discharge out of custody of the defendant, on the ground of his having been arrested a second time for the same cause of action. A judgment for 8000*l.* had been obtained by the plaintiff against the defendant, in a Court in *France*, which, upon appeal to the Court of *Cassation* there, was confirmed. The defendant was arrested upon that judgment; and, after being in custody four months, escaped, and came

to this country. He was now again arrested here in an action upon that judgment, by a Judge's order, for the 8000*l*. He cited *Com. Dig. Det. A. 2*, that an action will not lie on a judgment after execution sued by *elegit* or otherwise; for the plaintiff has chosen another remedy, and this even though the defendant taken in execution escapes (*a*); and he contended, that, upon the equity of that authority, the defendant was entitled to his discharge.

BAYLEY, B., said, that that case differed from this, for there the execution was in this kingdom; and the Court refused the rule.

(*a*) The authority cited by *Comyn* for this position, is 1 Roll. Abr. 601, l. 32; upon reference it will be seen, that *Rolle*, who quotes the Year Book, 11 H. 4, 45, mentions it with a *dubitatur*.

1832.
ALIVAN
v.
FURNIVAL.

BARNES v. WILLIAMS.

THIS was an action for a surgeon's bill. A lady, who lived in the defendant's house, being a material witness for the plaintiff, endeavours had been made to serve her with a subpoena, without effect. Upon the last occasion, it was sworn, that, whilst deponent was in conversation with the servant, a lady called to see the person wanted as a witness, and was informed that she was at home, and was admitted up stairs. The servant, however, said that she would not see the clerk. Under these circumstances—

Difficulty in serving a subpoena will not dispense with the necessity of personal service, unless it is sworn that the person keeps out of the way to avoid personal service.

Chilton moved, that leaving a subpoena for her at the house, might be deemed good service.

The Court inquired how that would get her into contempt.

Chilton.—The service of the subpoena, being under a rule of Court, would enable us to sue her.

1832.
 BARNES
 v.
 WILLIAMS.

BAYLEY, B.—You cannot swear that she keeps out of the way to avoid being served.

Chilton.—We swear that the lady was at home, and was heard speaking to the servant.

BAYLEY, B.—You might have gone up.

LORD LYNTHURST, C. B.—Is there any instance of such a motion?

Chilton.—None, that I have been able to find.

The Court refused the rule; observing, that there was no instance of an action against a witness under these circumstances.

BAKER and Another, Assignees, &c., v. NEAVER, Bart.

Proceedings in an action at the suit of assignees of a bankrupt were allowed to be amended by making the official assignee a joint plaintiff with the other assignees.

HUMFREY, on the 23rd instant, had obtained a rule to amend the proceedings in this action, by adding the name of the official assignee as co-plaintiff with the two assignees chosen by the creditors, in whose name only the action had been commenced. An application to this effect had been before made to Mr. Baron *Vaughan*, at Chambers, who desired the application to be made to the full Court.

Follett now shewed cause.—They have misconceived their action.

BAYLEY, B.—Is there not a clause in the Bankrupt Act, that the official assignee shall, *with the other assignees*, be the assignees (a)?

(a) 1 & 2 Will. 4, c. 56, s. 22.

Follett.—The defendant may have been going to trial, relying upon the objection as a ground of nonsuit.

1832.
BAKER
v.
NEAVER.

BAYLEY, B.—If you will make an affidavit that you are defending on the ground of the omission, we will hear you.

Follett.—There is nothing to amend by. The writ is by two plaintiffs; the declaration and issue by the same parties. Then they apply for leave to add another. No such amendment has ever been allowed. The name of a defendant has been struck out, but no addition has been made to the parties in a suit. Suppose it were an action on a contract?

BAYLEY, B.—Here the action is by persons suing as *assignees* of a bankrupt, and one is omitted.

LORD LYNTHURST, C. B.—One defendant has been struck out in an action on contract.

Follett.—That was first done in an action at the suit of a joint-stock company.

BAYLEY, B.—A writ of error has been amended by striking out the name of a plaintiff, and by altering a defendant's christian name.

LORD LYNTHURST, C. B.—Can you make a special affidavit that you defend on that ground only? otherwise, we will give leave to amend.

Humfrey, contra, mentioned *Taburn v. Tenant* (a), where an obligee's name was allowed to be added.

Per Curiam.—The rule must be absolute, the plaintiffs paying the costs of the amendment.

(a) 1 B. & P. 431. That amendment, however, appears by the report to have been made *with the defendant's consent*: but the learned editors doubt the necessity of such consent. *Ib.* note (b), p. 482.

1832.

The KING v. SLOMAN.

An attachment will not be granted against a witness for not obeying a subpoena, unless the original subpoena has been shewn, or if the witness has a reasonable ground for believing that he will not be wanted.

V. WILLIAMS shewed cause against a rule obtained by *Knowles*, why an attachment should not issue against a witness of the name of *Sloman*, for not obeying a subpoena. The action in which *Sloman* was subpoenaed was an action of trover against the sheriff, for the value of goods seized and sold by him under a *feri facias* issued against the goods of *Lloyd*, in an action of *Wandsworth v. Lloyd*. *Sloman* was the sheriff's officer; but the levy was in fact made by him and a person whom he employed, of the name of *Luckett*. All, therefore, that *Sloman* could prove, was equally known by *Luckett*. *Luckett* and *Sloman* were both in attendance for several days at *Westminster-Hall*, when the trial was expected to come on. It is sworn, that a conversation took place between *Sloman* and Mr. *Bell*, the plaintiff's attorney, at *Westminster*, in which *Sloman* told *Bell*, that *Luckett* levied the execution; and that, therefore, he, *Sloman*, would not be wanted, and should go. That the attorney said, very well; and that the proceeds of the levy were admitted by the attorney to amount to 68*l.* and upwards. But, there is a formal objection also. They are not in a condition to ask for an attachment, for we swear, that the original subpoena was not shewn.

Knowles, in support of the rule.—The purpose for which we wanted *Sloman* was not to prove the levy or the amount. *Sloman* was, in fact, the defendant. He had been examined before the commissioners of bankrupts, and he was asked, "had you any notice before the sale, that a docket would struck?" and he answered, "I had."

BAYLEY, B.—*Sloman* is not aware of the purpose for which you want him. He thinks you only want him to prove the amount of the proceeds.

Knowles.—He must have been aware for what we wanted him. The action was for selling goods under a *fi. fa.* Notice had been given that a docket would be struck against *Lloyd*; but *Sloman* said he would sell notwithstanding.

1832.
The KING
v.
SLOMAN.

BAYLEY, B.—That is not notice of the bankruptcy.

VAUGHAN, B.—Have you shewn the original subpoena?

Knowles.—The original need not be shewn unless asked for.

BAYLEY, B.—When you move for an attachment, you must shew the original.

Knowles.—Yes: the original *rule*; but not the subpoena, unless asked for. *Sloman* absented himself, and thereby committed a contempt. He sent *Luckett* down, who did not know the fact we wanted to prove, and the action failed in consequence of his absence.

BAYLEY, B.—The Master tells us it is necessary to shew the original subpoena. There are cases where the original need not be shewn; but, it is different where a party is to be brought into contempt. By *Sloman* and *Luckett* a conversation is deposed to, in which *Bell* is distinctly apprised and *Luckett* seized; *Bell* says, very well.

Rule discharged (a).

(a) *Rex v. Wood*, ante, p. 509.

1832.

WARD v. BATEMAN.

The defendant is not entitled to treble costs under the Highway Act, (13 Geo. 3, c. 78, s. 81), where a verdict is given for him.

THIS was an action on the case for an injury to the plaintiff's reversionary interest. The defendant pleaded the general issue, and tender of 6*l.* in amends. The action was referred, and the arbitrator found that the plaintiff had sustained 5*l.* damages; and that the wrongful acts charged against the defendant were done by him in the execution of his office of surveyor of the highways, and he ordered a verdict to be entered for the defendant. A rule *nisi* having been obtained by the defendant, calling on the plaintiff to shew cause why costs should not be allowed to the defendant—

Adams, Serjt., and *Amos*, shewed cause.—The question in this case turns on the construction to be put on the Highway Act, 13 Geo. 3, c. 78, s. 81 (a), which gives treble costs

(a) The 81st sect. is as follows:

“If any action or suit shall be commenced against any person or persons, for any thing done or acted in pursuance of this act, then and in every such case, such action or suit shall be commenced or prosecuted within three calendar months after the fact committed, and not afterwards; and the same and every such action or suit shall be brought within the county where the fact was committed and not elsewhere; and the defendant or defendants in every such action or suit, shall and may plead the general issue, and give this act, and the special matter, in evidence, at any trial to be had thereupon, and that the same was done in pursuance and by the authority of this

present act; and if the same shall appear to have been so done, or if any such action or suit shall be brought after the time limited for bringing the same, or be brought or laid in any other place than as aforementioned, then the jury shall find for the defendant or defendants; or if the plaintiff or plaintiffs shall become nonsuit, or discontinue his, her, or their action, after the defendant or defendants shall have appeared; or if, upon demurrer, judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall and may recover treble costs, and have the like remedy for recovery thereof as any defendant or defendants hath or have in other cases by law.”

to a defendant in certain cases. The clause which gives treble costs is in the nature of a penalty, and the case must be brought strictly within it. This case does not come within the strict words; for, to entitle a defendant to treble costs, there must be a nonsuit, or discontinuance, or judgment against the plaintiff on demurrer. *Gurney v. Butler* (a) is precisely in point. The question there was on the 11 *Geo. 2*, c. 19, s. 22, which gives double costs against a plaintiff in replevin, only in three cases, *viz.* where he is nonsuit, discontinues his action, or has judgment given against him. And, therefore, where, in replevin, the cause not being then at issue, the parties agreed by bond to submit the question to arbitration, the costs to abide the event, and the arbitrator afterwards awarded in favour of the defendant, it was held that he was not entitled to double costs under the statute. The Turnpike Act, 3 *Geo. 4*, c. 126, shews, that, if the case of a verdict for the defendant had been intended to have been included, different words would have been used than those found in the 13 *Geo. 3*. The words there are, (sect. 14), "if the plaintiff shall become nonsuit, or discontinue his action, *or have a verdict against him.*" In the 13 *Geo. 3*, a verdict is not one of the cases provided for. There are other acts where similar provisions are to be found, and the instance of a verdict will be found expressly mentioned; as in the Building Act, 14 *Geo. 3*, c. 78, s. 100, where the words are, "if a verdict," &c. So, in the 7 *Jac. 1*, c. 5, and the 11 *Geo. 2*, c. 19, s. 21. Another point was also made, that as the 13 *Geo. 3*, c. 78, ss. 79, 81, spoke of the general issue being pleaded, the act did not apply to cases where the defendant had thought proper not to rely on the general issue, but to plead specially, as the defendant had done in this case. [This latter point was not noticed by the Court.]

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WARD
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(a) 1 B. & Ald. 670.

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Goulburn, Serjt., and Humsfrey, contra.—The only question is, was this done by authority of the act; for, if it was, we are entitled to treble costs. The arbitrator has found that it was. The case of *Pratt v. Hillman* (a), turned on the construction of the 14 Geo. 3, c. 78, s. 100, the words of which are different from the present act; that was trespass, for an injury to the plaintiff by damaging his party wall, and the arbitrator to whom it was referred awarded that a verdict should be entered for the defendant; and there it was contended, that the words did not comprehend that case. The act did not say, "in case a verdict be awarded," but, "if a verdict be found" for the defendant; but the Court held, that, the plaintiff having failed, and the verdict being for the defendant, the case came within the evident object of the statute, and that there was no difference between a verdict found for defendant in open Court, and one awarded by an arbitrator, after a reference. So, here the object of this act comprehends the present case; though there may not be the words "verdict for the defendant," the Court will supply them to effectuate the object of the act. The Landlords' Act, 11 Geo. 2, c. 19, s. 21, which has been cited on the other side, bears no analogy; that was between landlord and tenant. Here, each sentence is complete in itself, and should be read separately.

BAYLEY, B.—If treble costs were intended for a defendant in this instance, the act is unfortunate in using words not calculated for it. Let us see whether the words apply to a verdict for the defendant. "If it appear that the thing was done in pursuance of the act, or done at any other place, or the action be brought after three months, the jury are to find for the defendant." That is one sentence. "Or if the plaintiff shall become nonsuit, or discontinue, or if

(a) 6 D. & R. 481; 4 B. & C. 403, S. C.

upon demurrer judgment be given against the plaintiff, &c." Only three cases are mentioned. I cannot say the act intended to give costs. In the 14 *Geo. 3*, c. 78, the words are different.

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BOLLAND, B.—I think the act throws protection around defendants as far as it ought. The act says, "and if the plaintiff shall become nonsuit, or discontinue his action, or the plaintiff get judgment on demurrer, the defendant shall have treble costs." If the plaintiff is nonsuited, he comes with no case into Court; if he discontinues, he voluntarily abandons the action; if he fails on demurrer, he is wrong in point of law.

Goulburn, Serjt.—Your Lordships will not discharge the rule with costs. It is a nice point.

BAYLEY, B.—Why will you try nice points at their expense?

Rule discharged, with costs.

GOMPERTZ v. DENTON.

R. V. RICHARDS and *Butt* shewed cause against a rule which had been obtained by the defendant, calling upon the plaintiff to shew cause why the defendant should not be allowed his costs under the 43 *Geo. 3*, c. 46, s. 3. for having been arrested and held to bail by the plaintiff for a larger

Where goods are sold with a warranty, and the warranty is found to be false, the purchaser cannot therefore rescind the contract by endeavouring to return the goods, unless the defendant agrees to take them back, or unless an express right to rescind is reserved at the time; and therefore, where a horse was sold warranted sound, and the horse proved to be unsound, but the seller refused to take back the horse, it was—*Held*, that the purchaser could not bring money had and received, and arrest for the price, having only a right to sue for damages. The seller having been arrested, and a less sum recovered, it was held to be an arrest without reasonable or probable cause, and that the defendant was entitled to his costs under the 43 *Geo. 3*, c. 46, s. 3.

vouring to return the goods, unless the defendant agrees to take them back, or unless an express right to rescind is reserved at the time; and therefore, where a horse was sold warranted sound, and the horse proved to be unsound, but the seller refused to take back the horse, it was—*Held*, that the purchaser could not bring money had and received, and arrest for the price, having only a right to sue for damages. The seller having been arrested, and a less sum recovered, it was held to be an arrest without reasonable or probable cause, and that the defendant was entitled to his costs under the 43 *Geo. 3*, c. 46, s. 3.

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sum than he recovered. The arrest was for 90*l.* the sum recovered 48*l.* 8*s.* 6*d.* The circumstances out of which the action arose were these:—The plaintiff bought a horse of the defendant at the price of 90*l.* and the defendant warranted the horse to be sound: the defendant in payment took 30*l.* in money, and a horse of the plaintiff valued at 60*l.* The horse purchased by the plaintiff of the defendant turned out to be unsound, and thereupon the plaintiff offered to return it; but the defendant refusing to take it back, it was sent to a livery stable; and the plaintiff caused a notice to be served on the defendant, informing him of the unsoundness of the horse, that it was standing at the livery stable at his expense, and that it would be sold by auction. The warranty being found to be false, and the plaintiff having done all in his power to rescind the contract, it was treated as at an end; and the plaintiff held the defendant to bail in 90*l.*, the price of the horse. The affidavit was for 60*l.* for the price and value of a horse sold and delivered; and for 30*l.* for money paid. The declaration contained special counts upon the contract, and also the common counts. It was contended, that, under these circumstances, an action for money had and received would have lain against the defendant, but that the only point in question here was, whether there was not reasonable or probable cause for the arrest. In the case of *Turner v. Prince* (a), the arrest was for 100*l.*, and upon a reference only 39*l.* 18*s.* were found to be due; yet, because the case was rather complicated, and though the sum recovered was so materially less than the sum for which the defendant was arrested, the Court refused to interfere. So, in *Sherwood v. Taylor* (b), where the arrest was for 327*l.* and the sum recovered only 250*l.*, the Court held that the difference was not so material as to induce

(a) 2 Moore & Payne, 305; S. C. 5 Bing. 191.

(b) 3 Moore & Payne, 641; S. C. 6 Bing. 280.

them to interfere; *Tindal*, C. J., observing that the labouring oar was thrown on the defendant to shew that so much was not due. In both cases it was considered necessary, that the evidence given in support of such a motion must be such as would maintain an action for a malicious arrest.

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BAYLEY, B.—It is not necessary that the arrest should be malicious (*a*). But was there here any authority to rescind the contract? If not, the plaintiff was only entitled to recover damages for the breach of contract, and not to sue for money had and received.

Richards.—When the horse was discovered to be unsound we were entitled to rescind the contract. We gave notice to the defendant, and he in fact brought back the horse he had of the plaintiff, with the view of returning it; but a quarrel took place and nothing was done.

BAYLEY, B.—You lay it down as clear law, that a party can rescind a contract, where the warranty is not complied with; but the case of *Street v. Blay* (*b*) is a directly contrary decision; unless you reserve your right to rescind at the time, at a later period you cannot do so.

LORD LYNDHURST, C. B.—On that contract you had no right to rescind, unless the other party agreed to it.

BAYLEY, B.—You describe in the declaration the contract as still in operation: if so, you cannot bring money had and received. *Towers v. Barrett* (*c*).

Butt.—There were the common counts.

(*a*) *Donlan v. Brett*, 10 B. & C. 117; S. C. 5 M. & R. 29.

(*b*) 2 B. & Adol. 456.

(*c*) 1 T. R. 133.

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Lord LYNDHURST, C. B.—Did you prove an agreement to rescind at the trial?

Butt.—It was proved by the plaintiff's attorney, that he served a notice on the defendant that the horse was unsound, and that it would be sold by auction; and that it was then standing at livery at his expense: an actual rescinding of the contract was not absolutely necessary: the defendant attended on the plaintiff to rescind the contract; but the negotiation went off.

Lord LYNDHURST, C. B.—Then it was not finally completed, and therefore the contract was not rescinded. You held to bail for 90*l*. when you were not entitled to do so.

Butt then cited *Sheldon v. Cox* (a), where the plaintiff having exchanged a horse for another horse and a sum of money, and the defendant refused to pay the money, alleging that the plaintiff's horse was unsound, it was held that the money might be recovered under the common counts.

BAYLEY, B.—The case of *Weston v. Downes* (b), shews that an action for money had and received, or money paid, will not lie to recover a payment which has been made on a contract which is still open: and in *Street v. Blay* (c), Lord Tenterden in his judgment cites *Weston v. Downes*, and *Towers v. Barrett*, and lays it down, that that class of cases was rightly decided: and it was there held, that a purchaser cannot by his own act alone, though the warranty is false, (except in cases where the contract expressly authorizes a return, or the vendor has received back the chattel, or has been guilty of fraud),

(a) 3 B. & C. 420; S. C. 5 D.
 & R. 277.

(b) 1 Dougl. 23.

(c) 2 B. & Adol. 462.

treat the contract as at an end, and revest the property in the seller, and recover the price when paid on the ground of total failure of consideration.

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DENTON.

Lord LYNTHURST, C. B.—If these cases are right, your remedy was by an action for damages, and not by holding the defendant to bail.

Butt.—We did all in our power to rescind; and, acting upon that state of facts, we had a reasonable cause for arresting.

Per Curiam.—It is clear you had no right to rescind: and the contract never was in fact rescinded. There must be two consenting parties: both must agree to rescind. Though you returned the horse and left it for a short time, the defendant would not accept it. If the contract is open, so as to give you a right to damages, you must bring your action for damages, and cannot bring an action for money had and received, nor can you arrest. The rule must be made absolute.

Rule absolute.

HARRISON v. BENNETT.

IN this case the jury having come into Court with a verdict for the plaintiff with no damages, were sent back by the Judge. One of the jury afterwards absconded, and the defendant was willing to let the verdict of the eleven be taken; the plaintiff refused. Upon a second trial, the plaintiff got a verdict with damages.

Upon a motion to review the Master's taxation, the question was, whether the plaintiff ought to have the costs of the first trial, or whether each party ought not to bear his own costs.

One of the jury having absconded before the verdict was delivered, and the plaintiff refusing to take a verdict from the eleven, a new trial was had, and the plaintiff obtained a verdict:—*Held*, he was entitled to the costs of both trials.

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The Court took time to consider, and held, that the plaintiff was not bound to take the verdict of the eleven jurymen; and that, as he succeeded on the second trial, the defendant appeared to be in the wrong by resisting the action; and that the defendant therefore ought to pay the costs of the first trial.

WILKINSON v. MALIN.

The Court will not give leave to a defendant to *nonpros* his own writ of error except on payment of costs.

GOULBURN, Serjt., applied, on behalf of the defendant, for leave to *nonpros* a writ of error, brought by him, without payment of costs: and he cited *Milborn v. Copeland* (a), to shew that a defendant had a right to *nonpros* his own writ of error, and *Salt v. Richards* (b), to shew that, under the statute 3 Hen. 7, c. 10, no costs are allowable where a writ of error is *nonprossed* before the record is transcribed.

Per Curiam.—If you have a right to *nonpros* it, you will do so at your peril. If you ask for the leave of the Court, it seems reasonable that you should pay the other party the expenses to which you have put them.

Rule refused (c).

(a) 1 M. & S. 104.

(b) 7 East, 111,

(c) Same case, 1 Crompt. & M. 240.

1832.

TOWNSEND v. BURNS.

IN this action, the defendant had suffered judgment to go by default, and a writ of inquiry having been executed, judgment was signed therein, in vacation, under the provisions of 1 *Will.* 4, c. 7, s. 1, and the defendant was taken in execution.

The defendant is entitled to have the inquisition, on a writ of inquiry being executed, filed, for the purpose of taking any objection to arrest or vacate the judgment: and the plaintiff's attorney having refused to file it, or to shew it to the defendant's attorney, the Court ordered the plaintiff's attorney to pay the costs.

Mansel, having obtained a rule calling on the plaintiff's attorney to shew cause why he should not file the writ of inquiry and subsequent proceedings, in order that the same might be read on a motion to be made to enter an arrest of judgment under the 4th section of the above act; and why the plaintiff's attorney should not pay the costs; upon an affidavit stating that the writ and subsequent proceedings had not been filed, and that the plaintiff's attorney had refused to file them, on application being made to him for that purpose.

Alexander shewed cause on affidavits, which stated that the deponent had inquired of a clerk in the *Exchequer* office as to the practice; and that he had informed him, that it was not customary to file inquisitions on writs of inquiry, but to deliver them over to the plaintiff; and that there was no file in the office for such inquisitions. The affidavit also stated, that the deponent had been informed and believed, that, from the year 1817, it had never been the practice to require writs of inquiry and inquisitions taken thereon to be filed; and he submitted that there was no necessity to file the inquisition for the objects stated on the part of the defendant, as he had an opportunity of obtaining the requisite information at the time of the execution of the writ of inquiry; and that at all events the attorney ought not to pay the costs of that motion, as there

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had been no application made to him for a copy by the defendant.

Per Curiam.—The defendant is entitled to see the inquisition, and to have it filed, for the purpose of taking any objections to which it may be open. The officer of the Court informs us, that there is a regular file, and a regular fee taken for the filing of inquisitions. When application was made to the plaintiff's attorney, to file the inquisition, he might have shewn it, or have allowed the party to take a copy of it.

Rule absolute (a).

(a) Same case, 1 Cr. & M. 177.

WILKINSON v. MALIN.

The costs of a good jury on the execution of a writ of inquiry are in the discretion of the Court.

THE Master, in taxing the plaintiff his costs on the execution of a writ of inquiry, allowed a charge for a good jury.

A motion was made to review the taxation; and, amongst other objections, it was contended that the Master ought not to have allowed the costs of the good jury; and *Dax on Costs* (a) was cited. The Court referred to the Master, who certified, that, since the late rule (b), the practice had been to allow those costs.

Lord LYNDHURST, C. B.—Before the late rule, the obtaining a good jury was the act of the party; now the granting such a jury is entirely in the discretion of a Judge.

Rule discharged as to the above item (c).

(a) p. 63. (b) H. T. 2 W. 4, r. 101. (c) Same case, 1 Cr. & M. 238.

BAKER v. WELLS.

Reported 1. C.B. 130.

IN this case, the affidavit to hold to bail, upon which the defendant was arrested, stated that the defendant was justly and truly indebted to the plaintiff in the sum of 609*l.* 3*s.*, in manner following; that is to say, in the sum of 500*l.* on the bond of the said defendant, bearing date the 18th *February*, 1829, in the penal sum of 1000*l.*, for securing to the plaintiff the sum of 500*l.* and lawful interest payable at a certain day then past; and in the further sum of 50*l.*, on a certain mortgage or conditional surrender, bearing date on or about the 12th day of *December*, 1829, and made by the said defendant, to the use of the said plaintiff; and in the further sum of 10*l.*, for the principal due on a certain promissory note of hand, drawn by the said defendant, payable to the plaintiff at a certain day then past; and also in the further sum of 44*l.* 9*s.* 6*d.*, for interest due on the said sums of 500*l.*, 50*l.*, and 10*l.*; and also in the sum of 3*l.* 7*s.* 6*d.*, for money paid, laid out, and expended by the plaintiff for the defendant, at his request; and also in the further sum of 1*l.* 6*s.*, for goods sold and delivered by the plaintiff to the defendant, and at his request; which said several sums of 500*l.*, 50*l.*, 10*l.*, 44*l.* 9*s.* 6*d.*, 3*l.* 7*s.* 6*d.*, and 1*l.* 6*s.*, made in the whole the said sum of 609*l.* 3*s.*

Where an affidavit to hold to bail embraces several causes of action, and one of them is defectively stated, it vitiates the whole affidavit, and the defendant is entitled to be discharged *in toto* on entering a common appearance.

Platt, having obtained a rule for discharging the defendant out of custody on entering a common appearance, on the ground that the affidavit did not shew that the 50*l.* secured by the mortgage or conditional surrender was due—

Thesiger shewed cause.

LORD LYNTHURST, C. B.—As no case has been cited, in

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which, where the affidavit was defective as to part, it has been held good for the other part, the rule must be made absolute.

Rule absolute, the defendant undertaking to bring no action (a).

(a) Same case, 1 Cr. & M. 238. See *Kirk v. Almond*, ante, 318.

WILLIAMS v. SMITH and Wife.

In an action against husband and wife, for a debt incurred by the wife *dum sola*, the Court refused, at the instance of the husband, to set aside an appearance entered for both, it appearing that the wife had given instructions to the attorney.

If an attorney appears for one without authority, and he applies quickly to the Court—*semble*, that the Court will interpose to protect him.

THIS was a rule calling on the plaintiff to shew cause why the appearance entered by one *John Williams*, an attorney of this Court, for the defendant, should not be set aside, and why the said *John Williams* should not pay the costs. Against which—

Watson, for the plaintiff, shewed cause. This is an action against husband and wife. The affidavit on which this rule was obtained, was only sworn by the husband; and, though he denies that he ever authorized Mr. *Williams* to enter an appearance for him, does not deny that his wife gave such authority. My affidavit in answer states what I consider to be a fatal objection at the outset, namely, that the defendant is under terms to plead issuably, and take short notice of trial.

BAYLEY, B.—Yes, but these terms were made by the very man whose authority is denied.

Watson then cited *Latuch v. Pasherante* (a), that if an attorney takes upon himself to appear, the Court will look

(a) Salk. 86; *Anon. Ib.*; and *Anon. Id.* 88.

no further, but proceed as if the attorney had sufficient authority, and leave the party to his action.

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BAYLEY, B.—In one of those cases the defendant did not apply till after judgment, whereas in this case the defendant has come as soon as possible. When was this application made, and when was the writ of summons returnable?

Espinasse.—The summons was returnable on the 9th, and my affidavit was sworn on the 17th, and the application made on the 18th.

Watson.—The time at which the application was made was immaterial, if there had been no authority.

BAYLEY, B.—The time is very material; after judgment a very considerable expense had been incurred by the plaintiff, who had no notice that the authority of the defendant's attorney was disputed. The other case in *Salkeld* turned upon the solvency of the attorney—have you any affidavit denying his solvency?

Watson.—Mr. Crowder appears for the attorney. I contend that the rule must be discharged, on the authority of both the cases in *Salkeld*; and, that the time when the application is made is immaterial, if it appears he came as soon as he had notice. And it does not appear in either of the cases in *Salkeld* but that the defendant applied as soon as he had knowledge of the facts of the case.

Crowder, for Mr. Williams. I have an affidavit of Mr. Williams, who swears, that he received his instructions from a Mr. Brown, in the country, where the female defendant lives, and who informed deponent, that he was instructed by the female defendant; and that deponent is

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agent for *Brown*; and that the action is brought to recover the amount of a debt due from the wife *dum sola*.

Espinasse, contra.—The whole of *Williams's* affidavit is mere hearsay. Why did not *Brown* make an affidavit? As he has not ventured to do so, the probability is, it is all false; and the defendant could not be prepared to anticipate in his affidavit this statement of *Williams*.

Lord LYNDHURST, C. B.—The defendant, who makes the application, has not given the Court all the information which he might have done. The rule must be discharged—the costs may be costs in the cause.

Rule discharged (a).

(a) See *Doe d. Davies v. Eyton*, 3 B. & Ad. 785.

—◆—
 RODWELL v. CHAPMAN.

Where a defendant was arrested on a *capias* founded upon an affidavit, on which a *capias* had previously issued into another county, upon which nothing was done:—*Held*, regular; and that the second *capias* need not be an *alias*.

THE plaintiff sued out a *capias* into *London*, on an affidavit of debt made there on the 8th of *November*; on the 13th, he sued out another *capias* into *Essex*, on which the defendant was arrested, and gave bail.

Maule now moved to set aside the second writ of *capias*, and, that the bail bond might be delivered up to be cancelled; and contended that the plaintiff ought to have issued an *alias* writ of *capias* into *Essex*, referring to the preceding writ, according to the form pointed out by rules 6 and 7 *Michaelmas Term*, 3 *Will.* 4; and he added, that the defendant was under a difficulty as to where he ought to put in special bail.

BAYLEY, B.—The affidavit of debt is made where the party making it happens to be, upon which a writ may be sued out into another county. Here the affidavit is made

in *London*, and a writ issues there, but nothing is done upon it; another original process is issued into *Essex*, upon which the defendant is arrested: bail may be put in in *Essex*. If the arrest had been made on a writ issued on a stale affidavit, that might have been a ground of objection.

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GURNEY, B.—If the plaintiff proceeds on the other writ, the defendant may have his remedy.

Rule refused (a).

(a) Same case, 1 Cr. & M. 70.

CAMPBELL v. ACKLAND.

THE defendant, having been convicted upon three indictments for libel, was sentenced by the Court of *King's Bench* to twelve months' imprisonment in the gaol of *Bury St. Edmunds*, on the first conviction, and for three months on each of the other two; making in the whole the term of eighteen months.

Where a defendant was sentenced to imprisonment for a libel, the Court enlarged the time for the bail to render him, till a week after his imprisonment expired.

Dunn now moved, on behalf of the defendant's bail in this action, to enlarge the time for rendering the defendant until a week after the expiration of the term for which he was sentenced; and cited *Rouch v. Boucher* (a), and *Ashmore v. Fletcher* (b).

Per Curiam.—The time should be enlarged until a week after his imprisonment under the three sentences has expired, but not until a week after the expiration of

(a) 10 Price, 104.

(b) 13 Price, 523.

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the term for which he was sentenced, as he may be pardoned before the term of the sentence has expired.

Rule accordingly (a).

(a) Same case, 1 Cr. & M. 73.

ANDERSON v. CALLOWAY.

The sheriff is not entitled to relief under the Interpleader Act, if he pays over the money to the execution creditor after notice of a claim by a third party.

THIS was an application by *Holt* on the part of the sheriff of *Middlesex*, for relief, under the Interpleader Act (a). The sheriff had seized goods under a *fi. fa.*, attested the 13th of *June*, and returnable the last day of *Trinity* Term. On the 15th he sold goods to the amount of 158*l.*; on the 19th he received notice of the bankruptcy; and, on the 20th, paid over the money to one of the execution creditors.

Follett, who appeared for the plaintiff in this action, contended that the sheriff was not in a condition to apply, having paid over the money to one of the contending parties after notice.

Holt, in reply, urged that the words of the act are, "*assignees* claiming." That, at the time of the notice given, no assignees had been appointed; and nothing is said in the sixth section about being ready to bring the money into Court, as there is in the first section.

LORD LYNTHURST, C. B.—The object of the act of Parliament was to afford relief to the sheriff where two parties are claiming the property, by making them fight it out; but he must have either the goods or the money in his possession. It does not apply to a case where he has paid

(a) 1 & 2 Will. 4, c. 58, s. 6.

over the money to one of the parties. The condition in the first clause is, that the party does not collude, and is ready to bring the money into Court. The words are, "that such defendant does not in any manner collude with such third party, but is ready to bring into Court, or to pay or dispose of, the subject matter of the action, in such manner as the Court (or any Judge thereof) may order or direct." The obvious meaning of that clause is, that the party applying has got in his possession the property in respect of which he is sued, and to which he claims no right; and I think that this clause governs the whole act.

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BAYLEY, B.—The act does not apply to such a case as this, where the sheriff has paid over the money. The "powers and authorities to be exercised by the Court for the relief of the sheriff," are in the 6th section expressly stated to be such "powers and authorities as in that act are before contained," which renders it necessary to refer to the preceding sections to ascertain the extent and application of those powers and authorities. Then, one condition in the first section is, that the party applying for relief shall be ready to bring the subject matter of dispute into Court, or to dispose of it as the Court shall direct. The act is a substitution for the remedy by bill of interpleader.

BOLLAND, B., and GURNEY, B., concurred.

The other judgment creditor did not appear; and the rule was ultimately made absolute, on the terms of the sheriff bringing into Court the amount of the levies in the several actions, *minus* what he had paid for rent and taxes.

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STREET v. Lord ALVANLEY.

In order to get a *distringas* to compel an appearance, a copy must be left.

GODSON moved for leave to issue a *distringas* on a writ of summons, on an affidavit, which did not state that the party attempting to serve the writ had, when he last called at the defendant's residence for the purpose of serving it, left a copy of it with the person he there saw.

BAYLEY, B.—It is proper in these cases always to leave a copy of the process, where the person who goes to serve it has an opportunity of giving the party whom he sees, and by that means the defendant also, the best notice of the object of his visit, and of the proceedings against him, by leaving a copy of the process. We ought not to be satisfied with notice of an inferior description.

Rule refused (*a*).

(*a*) S. C. 1 Cr. & M. 27. In two late instances on motions for a *distringas*, one made by Mr. Price, and another by Mr. Petersdorff, where the copy was left the first time of calling, it was held by Bayley, B., that that was wrong, as it ought to be left the third time; he referred to *Manning's Practice*; and the rules were refused. On the next day, Lord Lyndhurst said, that, on conference with the Judges of the other Courts, they

all agreed in opinion that the copy should be left at the last time of calling. In another case, moved by Mr. Turner, the Court refused the rule because the affidavit did not state that the defendant purposely kept out of the way to avoid being served, or shew any grounds for inferring that he did so keep out of the way.—*Eschequer, coram Lyndhurst, C. B., Bayley, Vaughan, and Bolland, Bs., Tuesday, April 22, 1833.*

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WEDDLE v. BRAZIER.

THE plaintiff filed a declaration *de bene esse*, at the opening of the office on the return day of the writ; and the defendant on the same day entered an appearance, but the plaintiff did not give notice of the filing of the declaration until the day after. A rule was obtained by *Knowles* for setting aside the declaration and all subsequent proceedings, for irregularity, and he referred to *Tidd* (a).

The declaration when filed is deemed a good declaration from the time of the notice only; and, therefore, where a defendant entered an appearance after a declaration *de bene esse* was in fact filed, but before notice was given to the defendant, the Court set aside the declaration and subsequent proceedings as being irregular.

Curwood shewed cause, and contended that the general rule that a declaration filed is good only from the time of notice, might lead to this inconvenience—that an appearance might be entered for the defendant, whilst the party who had filed the declaration was merely going from the office to give notice.

BAYLEY, B.—The rule may certainly be attended with the inconvenience alluded to; but, the practice is as laid down by Mr. *Tidd*, and we must act upon it.

Rule absolute (b).

(a) 9th ed. p. 456.

(b) Same case in 1 Cr. & M. 69.

TUCKER v. MORRIS.

IN this case the defendant had obtained a rule under the first section of the Interpleader Act, for relief against the claims of the plaintiff and one *Taylor*. It was an action of trover for two mares; and it appeared from the

A defendant who is sued for the recovery of property in his possession, in which he has no interest, but which is claimed by a third person, cannot apply to be relieved under the Interpleader Act against the claims of such third party, if he has an indemnity from the claimant.

son, cannot apply to be relieved under the Interpleader Act against the claims of such third party, if he has an indemnity from the claimant.

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plaintiff's affidavit, that the defendant had taken an indemnity from *Taylor* for not delivering them up. *Taylor* did not appear.

BAYLEY, B.—As the defendant has thought proper to take an indemnity, he has no right to apply for relief under the act. By so doing, he has identified himself with *Taylor*. It seems to me, therefore, that the justice of the case is clear. An application is made to the defendant to deliver up the property, and he refuses, on the ground, that he is indemnified by *Taylor*; and, as *Taylor* has withdrawn himself, and does not support his claim, the rule must be discharged, and the defendant must pay the costs.

Rule discharged, with costs (a).

(a) Same case in 1 Cr. & M. 73.

KING v. JONES.

A defendant who is under terms to take short notice of trial, is notwithstanding entitled to full notice of countermand; and, therefore, where a defendant so circumstanced did not receive the usual notice of countermand, he was held to be entitled to the costs of the day, his rule for judgment as in case of a nonsuit being discharged on a peremptory undertaking.

JOHN JERVIS having obtained a rule for judgment as in case of a nonsuit, the question was, whether the defendant was entitled, under the circumstances, to the costs of the day, the rule being discharged on a peremptory undertaking.

The defendant was under terms to accept short notice of trial in a country cause, the plaintiff gave only four days' notice of countermand. Upon which,

Lloyd contended that the defendant, being under terms to take short notice of trial, was not entitled to the usual notice of countermand; but—

Per Curiam.—The defendant's undertaking to accept short notice of trial does not entitle the plaintiff to limit

the time of countermand; but, the defendant stands in the same situation in that respect, as if he had been entitled to a ten days' notice of trial. If the plaintiff did not intend to have proceeded to trial, he ought not to have given notice of trial.

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JOHNSON v. ROUSE.

MANSEL applied for leave to issue a *distringas* after a writ of summons, which had not been personally served. The affidavit on which this application was made, did not set forth the facts required to be stated in the affidavit to ground a motion for a *distringas* upon a *venire* according to the rule of practice established in *Pitt v. Eldred (a)*, and adhered to in subsequent cases.

The requisites for moving for a *distringas* on a *venire* according to the old practice, are applicable to the *distringas* given by the New Process Act, and must be complied with before moving for a *distringas*.

BAYLEY, B.—The affidavit is defective. The rules which have been acted upon by this Court in granting a *distringas* upon the writ of *venire*, are properly applicable to the new writ of summons; and, as this affidavit does not state the necessary facts required, according to the rule laid down in *Pitt v. Eldred*, it is insufficient.

Rule refused (*b*).

(*a*) 1 Cr. & J. 147.

(*b*) Same case in 1 Cr. & M. 26.

FLEMING'S Bail.

ONE of the bail, who was described as a "Gentleman" in the notice of bail, on his examination stated, that he had been an agent for the sale of *Scotch* ale until within the last three weeks, in *Southwark*, and was now looking out for another situation of the same description.

An agent for the sale of *Scotch* ale, who described himself as a gentleman in the notice of bail, was held to be misdescribed.

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GURNEY, B., considered this a substantial misdescription of the bail, calculated to mislead; and said, that a person carrying on a trade ought not to be described as a gentleman.

Bail rejected (a).

(a) Also reported in 1 Cr. & M. 111.

BRIAN v. STRETTON.

The eight days which the defendant has to appear in to the writ of summons are to be reckoned from the time of the last attempt which is made to serve him.

CHAMBERS applied for a *distringas*. The copy writ of summons was left on the 21st of *November*, and the application was on the 26th. The defendant could not be personally served; the affidavit stated the various attempts that had been made.

Per Curiam.—Your application is made too early; for the defendant has eight days to appear to the writ of summons, after it has been served. Where the defendant cannot be personally served, the eight days must run from the time of the last application at the defendant's house. When the requisite number of calls have been made, the service may be said to be completed, and not before; therefore, the eight days must be calculated from the time of the last call.

Rule refused.

Hilary Term,

IN THE THIRD YEAR OF THE REIGN OF WILLIAM IV.

PARKER v. ADE.

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THIS was an action on a bill of exchange, by the indorsee against the indorser. The bill was drawn by *Samuel Southgate* upon *J. Haward*, payable to *Ade*, and accepted, payable at No. 8, *Cheapside*. At the trial, before *Bolland, B.*, the bill, as stated upon the record, varied from the bill produced in evidence, it being alleged to have been drawn payable to *Southgate's* order, and indorsed by him to *Ade*, and by *Ade* to the plaintiff. The bill produced in evidence was payable to *Ade*. The counsel for the plaintiff requested that the record might be amended, so as to make the statement on the record agree with the bill produced in evidence, according to the 9 *Geo. 4, c. 15*. This was opposed on the part of the defendant. It was not denied that it was a mistake; nor was it suggested that any such bill as that stated on the record was in existence. The learned Baron ordered the record to be amended, and the plaintiff obtained a verdict.

J. Jervis on a former day obtained a rule *nisi* to set aside that verdict, and, being now called on by the Court, endeavoured to support the rule on two grounds. *First*, That the learned Baron had no power to make such an alteration; and, *secondly*, That the presentment was not

The 9 *Geo. 4, c. 15*, which authorizes a Judge to order amendments of variances in records, invests him with a discretion which cannot it seems be revised by the Court above.

In an action on a bill of exchange, by indorsee v. indorser, the bill was stated to have been drawn payable to the drawer's order, and by him indorsed to *A. B.*, whereas it appeared in evidence to have been drawn in favour of *A. B.* The Judge having amended the record, the Court above approved of it.

In an action against an indorser of a bill of exchange, though it is necessary to prove a presentment

at the place pointed out by the acceptance, it is not necessary to allege in the declaration that the bill was accepted, payable at that place; though, if such special acceptance is stated, there must be a corresponding allegation of a presentment.

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sufficiently stated, to charge the defendant as indorser. Upon the first point, he cited *Webb v. Hill* (a), that, where the proof and allegation are substantially different, no amendment will be allowed. He contended, that here there was a variance in substance, and not merely in form. In *Jelf v. Oriel* (b), the bill was stated to have been made payable, by the acceptance, at *Esdaile & Co.*, or at *Howland-street, Oxford-street*. The last words were said not to have been in the hand-writing of the acceptor. The Judge at the trial refused to alter the record by striking out the latter words. [*Bayley, B.*—There they stated an alternative acceptance, and wanted an alteration. There is only one bill here by *Southgate*.] Lord *Tenterden* says—“ I have always thought we have gone too far from the strict rules, for the purpose of attaining justice in some particular case; the consequence has been, that those cases having been quoted as precedents, great laxity has been introduced into the practice.” The declaration here states an indorsement from *Ade* to *Southgate*; the alteration proposed, is to substitute *Southgate* as payee, and leave out *Ade's* indorsement. [*Bayley, B.*—There is only one bill by *Southgate*.] You are not to look to the particular case, but (as Lord *Tenterden* says) to the general rule. *Secondly*, The bill being accepted, payable at a particular place, it was necessary, to charge the defendant as indorser, to allege a presentment there. He cited *Gibb v. Mather* (c), where it was held, that, in order to charge any party but the acceptor, it was necessary to prove a presentment at the place specially pointed out by the acceptor. If it is necessary to be proved, it is necessary to be alleged on the record. And *Tindal, C. J.*, in giving the judgment of the *Exchequer Chamber* in that case, speaks of aver-

(a) 1 M. & M. 253.

(b) 4 Car. & P. 22.

(c) 1 Moore & Scott, 387; S. C. 8 Bing. 214.

ring and proving such a presentment as being both necessary (a).

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BAYLEY, B.—The 9 Geo. 4, c. 15, provides, “That it shall be lawful for every Judge sitting at *Nisi Prius*, if he shall so think fit, to cause the record, where any variance shall appear between any matter in writing or print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular; and, thereupon, the trial shall proceed as if no such variance had appeared.” In this case, an action was brought on a bill of exchange indorsed by the defendant, and misdescribed in the declaration as payable to the order of *Southgate*, and indorsed to *Ade*; whereas, it was payable to *Ade*, and indorsed to the plaintiff. The question which has been raised is, whether the Judge exercised a sound discretion in altering the record according to the facts. I entertain great doubt whether it was not exclusively for the discretion of the Judge, and whether it is competent for this Court to revise the discretion of the Judge. No such power is given by the act. But, assuming that this Court has such a power, I think the learned Judge was right. The bill corresponds in date, amount, and drawer. If the present defendant could have shewn that there were two bills, then, if I was at liberty to revise the opinion of the Judge, I should say, this is an action brought on the wrong bill, and should have refused the amendment; but here, it is a mistake, and it does not interfere with the justice of the case. *Jelf v. Owen* was a *Nisi Prius* decision, certainly of a very learned Judge, of

(a) 8 Bing. 220. In *Hawkes v. Salter*, 1 Moore & Payne, 750; S. C. 4 Bing. 715, in an action against the drawer, where the presentment was to the *bankers*, it was contended, that the presentment

should have been to the *defendant*, as the 1 & 2 Geo. 4, c. 78 had made an acceptance at a particular place, without the words “only,” or “not elsewhere,” a general acceptance.

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whom I entertain the highest opinion; but he was always admitting he might be wrong, and wishing his own opinion to be reviewed. There the case was different; the bill was payable at *James Esdaile & Co.*, or at *Howland-street*. Perhaps the alteration there might have interfered with criminal justice. The next question is, whether it was incumbent on the plaintiff to have alleged the presentment at a particular place. A presentment is stated. He was clearly not bound to state the manner and place of the acceptance. In an action by indorsee against indorser, you may state the direction to *J. P.*, and that the bill was duly presented, without stating the acceptance (*a*). And it has been held, that, if the acceptance is unnecessarily stated, it must be proved as laid (*b*). In *Gibb v. Mather* a special acceptance was stated, and, therefore, a presentment ought to have been stated conformably with that acceptance. Here, there was no averment of a special acceptance, and, therefore, an averment of a special presentment was unnecessary; and, if all that was necessary to be proved was proved, that is sufficient. Here, a proper presentment was proved.

VAUGHAN and BOLLAND, Barons, expressed themselves of the same opinion.

Rule discharged (*c*).

R. V. Richards was to have shewn cause.

(*a*) This proposition is laid down very positively in several instances, but no authority is cited. See Bayley on Bills, 316, 317, (4th ed.); Chit. Bills, 484, (5th ed.); *Jones v. Morgan*, 2 Camp. 474, in arg.

(*b*) *Jones v. Morgan*, 2 Camp. 474. See also 1 Camp. 175. But

in *Tanner v. Bean*, 4 B. & C. 312, it was expressly decided, that an allegation of an acceptance unnecessarily made, was not matter of description, and need not be proved.

(*c*) See *Bush v. Kinnear*, 6 M. & S. 210.

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WILLIAMS v. DAVIS.

THIS was an action of *assumpsit* on several bills of exchange of various dates, with the common counts. The defendant pleaded the general issue, the statute of limitations, and a set-off. The plaintiff's counsel, in the first instance, proved a sum of 22*l.* 6*s.* 8*d.* to be due to him from the defendant, and intimated that they had documents to prove a larger sum to be due, which they should not put in unless the defendant went into his set-off. The defendant's counsel objected to this, and insisted that the plaintiff was bound to prove his whole demand in the first instance, and could not prove a further claim after the defendant had gone into his case. The defendant then proved his set-off to a larger amount than the plaintiff had proved. The plaintiff, in reply, proposed to prove two bills of exchange, stated in the particulars as given for defendant's accommodation without any consideration; and the evidence, though objected to, was admitted.

Where there are cross demands between the plaintiff and defendant, the plaintiff need not in the first instance prove the whole of his account, but need only prove the balance which he claims: and, if the defendant proves his set-off to a larger amount, the plaintiff may then prove other parts of his account to exclude the defendant's set-off.

Chillon moved for a new trial on several grounds, and contended, that evidence had been improperly admitted for the plaintiff; and, that it was too late, after the plaintiff had closed his case, to go into fresh evidence of demands which he had not made part of his case in the first instance. He cited the case of *Browne v. Murray* (a), and *Rees v. Smith* (b), where Lord *Ellenborough* held, that when, by pleading or means of notice, the defence was known, the counsel for the plaintiff was bound to open the whole case in chief, and could not proceed in parts.

Per Curiam.—It would be very inconvenient, if, where an account runs through a number of years, the plaintiff

(a) Ryan & M. 254.

(b) 2 Stark. 31.

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should be obliged to go at once into the whole of his case. We think that is no ground for a new trial.

Rule refused on that ground, but granted on others.

MILEY v. WALLS.

To a declaration on a bill of exchange, indorsee against acceptor, the defendant pleaded, that the bill was accepted by him in blank and afterwards filled up, and that he had received no consideration for the acceptance, and the plaintiff was aware of these facts. A Judge at Chambers having in vacation, upon an affidavit of the falsity of the plea, ordered that the plaintiff should be at liberty to sign judgment, the plea appearing to be bad for duplicity, the Court of *Exchequer* set aside that order.

Where a defendant pleaded a plea containing a number of facts, and calculated to perplex the plaintiff, the Court, on an affidavit of its falsity, and no pretence being shewn for pleading it, ordered it to be set aside.

THIS was a rule calling on the plaintiff to shew cause why an order of Mr. Baron *Gurney*, that the plaintiff should be at liberty to sign judgment, should not be set aside. The action was brought on a bill of exchange by the indorsee against the acceptor. A motion had been made to set aside the declaration for irregularity. The plaintiff amended, and paid the costs. The declaration was then specially demurred to, for not alleging that the plaintiff was a debtor to the King. The declaration was again amended, and costs paid. The defendant then pleaded, that the bill on which the action was brought was obtained from the defendant without consideration; that a blank piece of paper, on a *2s. 6d.* stamp, was handed to him, with a request that he would put his name as acceptor; that he accepted it, payable at a particular place only; and that these facts were known to the plaintiff. A summons was taken out for signing judgment, notwithstanding the plea, which was attended by both parties before *Gurney, B.*; and the plaintiff produced an affidavit of the drawer, with the bill of exchange annexed, in which it was sworn, that the bill was regularly signed and delivered, and that all the allegations in the plea were false; and the bill produced was accepted, payable in the usual manner, and not at a particular place only. The learned Baron thereupon made

an order, "that the plaintiff should be at liberty to sign judgment, notwithstanding the plea—the plea appearing to be defective." Judgment, however, had not been signed.

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Chilton shewed cause, and contended, that the facts sufficiently authorized the interference of the learned Baron. This is an ingenious and perplexing plea: it tenders four issues, and it could not be safely replied to without the assistance of counsel; and, being altogether false, the Court has power to set it aside. [*Bolland*, B.—The order says, "the plea being defective." Are you not bound by that, supposing a Judge has power to set aside a false plea?] By my affidavits, it appears, that the plea was in fact set aside, because it was false as well as bad. The order was made in vacation; and it is a case of all others calling for the speedy interference of a Judge; for, if a Judge at Chambers could not set aside such a plea, the defendant, by means of a false plea, would have an undue advantage. He cited *Shadwell v. Berthoud* (a), *Body v. Johnson* (b), *Corbett v. Powell* (c), *Bartley v. Godslake* (d), *Smith v. Hardy* (e), and *Thomas v. Vandermoolen* (f), to shew, that where the plea is so framed as that it may reasonably induce the plaintiff to consult counsel, in order to know how to deal with it, or is calculated to raise different issues, or to perplex the plaintiff, the Court will, on affidavit that such plea is wholly false, permit the plaintiff to sign judgment as for want of a plea.

Mansel shewed cause.—The learned Judge had no power to make such an order. No Court, even in term time, had gone the length of setting aside a single plea merely because it was false. He then cited *Merrington v.*

(a) 5 B. & A. 750.

(b) *Id.* 750, note (a).(c) *Ibid.*

(d) 2 B. & A. 199.

(e) 1 Moore & Scott, 676; S.

C. 8 Bing. 435.

(f) 2 B. & A. 197.

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Beckett (a), to that effect, where *Abbott*, C. J., said, "We have deliberated on this point, and we are of opinion, that the Court has no power to demand of a suitor an affidavit that his plea is true. We have also considerable doubt, whether the Court would be justified in calling on an attorney to shew by whose authority he pleads a dilatory plea, because that would in all probability be requiring him to divulge the confidential communications of his client. We now wish it to be understood, that we lay down no general rule on this subject; we think it better for the present to let the practice remain as it is." Here, the order states "the plea being defective." If the plea was bad for duplicity, they might have demurred, and it would have been decided at the beginning of the term; or, they might have taken issue, and gone to trial at the first sitting. [*Bayley*, B.—Here, the plea is totally false. The stat. 3 *Edw.* 1, c. 29, enacts, "That no serjeant, pleader, or other, do any manner of deceit or collusion in the King's Court, in deceit of the Court, or to beguile the Court or the party, on pain, if he be no pleader, of imprisonment for a year and a day at the least." In *Pierce v. Blake (b)*, an attorney assigned infancy for error. His client was forty years old; and the Court said, that if an attorney puts in a false plea to delay justice, he breaks his oath, and may be fined for putting a deceit on the Court. The Court threatened, if the attorney persisted, to inquire into the truth of the plea, and, if they found a deceit and a trick, they would fine him.] The case of *Richley v. Proone (c)*, where the Court of *King's Bench* allowed judgment to be signed, where a sham plea was pleaded, was expressly overruled in *Merrington v. Becket*; and in *Smith v. Backwell (d)*, where the defendant pleaded the delivery and acceptance of a pipe of wine in satisfaction, the Court of *Common*

(a) 3 D. & R. 231; S. C. 2 B. & R. 661.

C. 81.

(d) 1 Moore & Payne, 338; S.

(b) 2 Salk. 515.

C. 4 Ring. 512.

(c) 1 B. & C. 286; S. C. 2 D. &

Pleas refused to allow the plaintiff to sign judgment as for want of a plea, on an affidavit that the plea was false. *Park, J.*, there observed, that there was but a single plea, and distinguished it on that ground from *Bones v. Punter (a)*, where two pleas were pleaded; and *Burrough, J.*, said, "I object to this application *in toto*. By and by it will be said, that a defendant must not plead the general issue without an affidavit of its truth. That is often as false a plea as the present; but, the principle of our law is, that the plaintiff must make out *his* case. With respect to pleas in abatement, the statute of *Anne* has required an affidavit of their truth; and, if it had been thought fit to require an affidavit in other cases, it would have been easy to have so enacted it; but the absence of any such enactment, when the intention of the legislature had manifestly been called to the subject, shews that it was not deemed proper to extend the practice further." The rules that have been laid down appear to be these;—first, where several issues are tendered, some to the Court, and some to the Jury. Secondly, if pleaded under terms, and the plea is false. Thirdly, where the plea bears on the face of it the evidence of falsity, as a plea of judgment in the Piepoudre Court, or plea of judgment recovered before the promises were made. Fourthly, where more than one plea is pleaded. [*Bayley, B.*—There is the principle of an attorney's oath, that he will demean himself properly; on which also the Courts have acted.] The Court cannot take upon itself the province of a jury. Here, there is but one plea, and there is nothing on the face of it to shew it is false; and we are not under terms. The Court has no power to treat it as a nullity.

The Court, in the course of the argument having suggested, that it would be proper that the attorney for the

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defendant should make an affidavit as to his authority to put on the record a statement of facts, which appeared to be invented for the occasion, the case stood over for that purpose; and on a subsequent day the attorney produced an affidavit, detailing the intercourse which had taken place between him and his client, at length. The Court refused to receive that affidavit, on the ground that an attorney had no right to disclose the confidential conversation and communications of his client, without his permission; and directed the attorney, if he could, to make a general affidavit that the facts alleged in the plea were suggested to him by his client, and were true. The attorney now produced an affidavit, that the plea was according to the instructions given him by his client, and that the attorney believed them to be true. The Court ordered the affidavit to be filed, and observed, that it seemed to them to be an answer to the objection that the plea was false.

Chilton.—I contend, that it does not vary the question upon this rule. This is an application to set aside an order. It was never pretended from the first that the plea was true. [*Vaughan, B.*—If it becomes reasonably in doubt whether the plea is true, can a Judge set it aside?] The defendant ought not to be in a better situation because he has imposed upon his attorney. The bill upon the face of it shews that the plea cannot be true. The question is not whether it is false within the knowledge of the attorney; that has never been the distinction. Here, the defendant prevents the course of justice by imposing upon his attorney and the Court. [*Bayley, B.*—Have you any instance where the Court has acted, where a party has appeared in person?] In *Merrington v. Becket* I collect that would have been so. The rule is, if a party pleads with perverse ingenuity, the Court will interfere. Four facts are alleged in the plea, all which we swear to be false. By the indulgence of your Lordships they have been al-

lowed to put in an affidavit, and have the advantage of swearing last. The plaintiff ought not to be affected by any affidavit now made; it would have been better for us to have demurred. The affidavit is very cursory. The attorney might have been told by his client, "I have no defence, but want time;" and then the affidavit would be correct to the letter.

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BAYLEY, B.—I think not. He would be guilty of gross perjury.

VAUGHAN B.—If such an affidavit as this had been shewn to the Judge, would he have made the order?

The Court took time to consider, and ultimately made the rule absolute.

Chilton afterwards obtained a rule *nisi* to set aside the plea, on reading the office copies of the affidavits he had used on shewing cause against the former rule.

Mansel shewed cause. But, there appearing to be no foundation for the plea, this last rule was on the last day of term made absolute. *Mansel*, thereupon, tendered a bill of exceptions, contending, that the Court had no power to take a single plea off the records of the Court under the circumstances.

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ANONYMOUS.

The 2 Will. 4. c. 39, s. 12, which requires every writ to bear date on the day it issues, is not satisfied by a day being indorsed on the writ.

Where there is an objection in point of form, which applies as well to the writ as the copy, the defendant cannot move to set aside the service of the writ only, but he must move to set aside both writ and copy: there must be some irregularity in the service to warrant a motion to set aside the service only.

CHILTON, on a former day, had obtained a rule *nisi* for setting aside the service of a writ of summons, for irregularity, on the ground that it omitted to state the day on which it issued, according to the provisions of the 2 Will. 4, c. 39, s. 12, which directs that every writ shall bear date on the day on which it issues.

Platt shewed cause.—The objection here, if any, is to the writ. The writ is good upon the face of it: it is tested before Lord *Lyndhurst*, 26th November, in the 3rd year of our reign. In their affidavit, they say they have been served with a copy of our writ. The rule therefore is wrong; it should have been, to set aside the writ. The teste and date is part of the body of the writ. There is a date indorsed.

BAYLEY, B.—That will not do: the indorsement is not the date.

Chilton *contrà*.—If we had moved to set aside the writ, it might have been right.

BAYLEY, B.—You might have moved to set aside the writ and service.

Chilton.—Then we should have been told we had asked too much, if the writ was right.

BAYLEY, B.—The Court would then have set aside what appeared to be irregular. If you do not impeach the writ, do you not admit it to be regular?

Chilton.—They object that we have not asked all that we might; they say they are more irregular than we sup-

pose. We cannot get at the writ to know how it was; and it is not now produced, nor is it shewn by affidavit how it is. There cannot be a good service of an irregular writ. It is not to be assumed that the writ is wrong, as well as the copy: if the writ is correct, the motion is right; they might have produced the writ to shew how it is. They can amend their writ, and get it resealed. He referred to *Miller v. Bowden* (a).

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BAYLEY, B.—There the day of issuing the writ was not indorsed on the copy.

Chilton.—If the writ is bad, the service must be bad also.

BAYLEY, B.—You suppose, by your affidavit and the form of your motion, that you were served with a copy of the writ. If you had moved to set aside the writ and service, or the writ or service, and the writ turned out to be right, the rule would not have been discharged, but would have been made absolute as to so much as was irregular. A motion was made to set aside an execution on a warrant of attorney: but the Court held, that could not be, for the judgment and warrant of attorney were admitted to be good. Here the party only desires to set aside the service where he is duly served with a copy. The affidavit shews an objection, not to the service, but to the writ itself. You ought to have pointed out an irregularity in the service.

Rule discharged without costs.

(a) 1 Cr. & J. 563.

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CLARK, Surviving Executor of JONES, v. Rev. JOHN
MANNs.

Whilst a cause stood in the paper for trial, the plaintiff having obtained an order to amend, (which was, in fact, unnecessary), the defendant took out a summons to rescind that order for irregularity, and an order to that effect was obtained; whilst the second order was in discussion at chambers, the cause was tried, and the plaintiff obtained a verdict: the Court refused to grant a new trial without an affidavit of merits.

ARCHBOLD moved to set aside a verdict for the plaintiff, obtained in this action, and that the attorney should pay the costs, under these circumstances. The action was brought by the plaintiff as surviving executor of *Jones*. The cause was tried on the 17th of *December* last. On *December* 13th, a summons had been taken out by the plaintiff to amend the proceedings, by adding the name of *Jones*, who was alive: that summons was attended by both parties before *Vaughan*, B., who refused to make the order. On the 14th such summons was taken out; and, on the 15th, *Bolland*, B., made an order to that effect. The defendant then took out a summons to rescind that order, on the ground of irregularity, which was attended by both parties before *Bolland*, B., on the 18th, when several cases were cited, and ultimately the learned Baron made an order to rescind the former order, as being irregularly obtained. On going away, the plaintiff's attorney's clerk said that he did not care, for the cause was tried yesterday. The defendant had pleaded the general issue and a set-off.

BAYLEY, B.—It was unnecessary for them to have got the order, and you need not have applied to rescind.

Archbold.—It is sworn, that the defendant did not expect the cause to come on on that day; but there is no affidavit of merits: the grounds of the motion are—surprise, and improper practice on the part of the plaintiff's attorney and his clerk.

Follett shewed cause in the first instance.—There is no defence on the merits, and it is not shewn that instructions were ever given to counsel. A bond was given to the

plaintiff in 1805. The defendant was arrested in *November*, 1824, and requested that the plaintiff would not charge him in execution. This was an action on the judgment commenced while the defendant was in custody. The set-off was for board and lodging, and an order for particulars was obtained, but none given. We had been told that *Jones* was dead.

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Per Curiam.—The trial came on in its regular course. There is no affidavit of merits, or that the defendant did not know that the trial was coming on.

Rule refused.

MORRIS v. EVANS.

THIS was an action for disturbance of a right of ferry. At the last assizes for *Carnarvonshire*, an attempt was made before Lord *Lyndhurst*, C. B., to amend the declaration by adding new counts, but without success, his Lordship thinking it was too late. *John Jervis* in this term obtained a rule *nisi* for that purpose. The plaintiff claimed under a grant from the crown of a ferry described as "all that ferry over the *Menai*, called the *Tulliveolan* ferry, with the appurtenances." The limits of that ferry were not defined in the grant. It was described in the declaration as an ancient ferry, called *Tulliveolan*, in *Anglesea*, across the *Menai* waters. The plaintiff claimed a right of ferry from *Carnarvon*, on one side, to *Tulliveolan* and *Barras* on the other, including the whole line of coast between those two places, of a mile and a half in length. The new counts introduced claims of a right of ferry from *Carnarvon* to *Barras* and all intermediate places from *Carnarvon* to *Tulliveolan*, as near as wind and tide would permit—and also an exception as to certain persons from liability to toll.

In an action for disturbance of a right of ferry, the declaration was allowed to be amended, after the cause had been taken down to the assizes and the record withdrawn, by introducing new counts, in which the *termini* of the ferry were varied, and also the description of the persons liable to toll.

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Lloyd shewed cause.—He contended that the new counts would introduce an entirely new cause of action. A ferry to *Barras* must be a totally distinct ferry from that to *Tulliveolan*, a mile and half off. The introduction of different *termini* would render new evidence necessary for the defendant, and enable the plaintiff to recover on a different ground from that on which both parties had gone down to trial: if the points at which they aim are distinct points, especially at such a distance as they are here, they are different ferries.

J. Jervis, in reply.—The *termini* of the ferry are not mentioned in the grant. We say we are bound to provide boats to and from all the places within the line of coast from *Tulliveolan* to *Barras*. This is different from an ordinary ferry: in a ferry over fresh water, we must have property in the soil, but the property on the sea shore is in the Crown, and we may land any where. We have laid our right too narrow in the declaration. The new counts only state, with more particularity, the same ferry as is described under the name of the *Tulliveolan* ferry.

Per Curiam.—The rule adopted at chambers is, that you may at any time introduce a new count, if you do not thereby introduce a new cause of action, but only a variation in the mode of stating it. You cannot introduce a claim of a separate ferry to *Barras*; you can only lay it as part of the *Tulliveolan* ferry.

Amendment allowed on payment of costs.

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BROWN v. PROBERT.

A RULE *nisi* had been granted for judgment as in case of a nonsuit. Counsel was proceeding to shew cause, when it appeared he had no office copy of the affidavit on which the rule was moved.

Cause cannot be shewn till an office copy is taken of the affidavit on which the rule *nisi* was obtained.

The Court said, he could not be heard, till he had got an office copy. The rule was allowed to be postponed for that purpose.

HUNT v. PITT.

THIS was a special demurrer to a declaration, on the ground that the plaintiff had not alleged that he was a debtor to the King, or was the less able to satisfy the debts which he owed him. The proceeding was by writ of summons.

Since the late act of the 2 Will. 4, c. 39, it is unnecessary, in the *Exchequer*, to suggest in the declaration, that the plaintiff is a debtor to the King, or is less able to pay the King's debt.

Mansel, in support of the demurrer, now argued on the authority of the case of *Nickling v. Dickens* (a), lately decided in this Court, that those allegations were necessary in order to shew this Court's jurisdiction. In that case it was held, that a declaration, which commenced by stating that the plaintiff was a debtor to the King, was bad on demurrer, because it did not conclude with the allegation, that the plaintiff was by the defendant's default rendered less able to satisfy the King's debts. It is true, that case occurred before the act of the 2 Will. 4, c. 39, was passed: but the rules of T. T. 1 Will. 4, and forms accompanying, had given a general form of conclusion for all declarations, which had been followed in that instance, and yet the Court

(a) *Jervis's Rules*, 2nd ed. p. 50, note (f).

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decided in favour of the objection. He contended that there were no express words in the late act giving this Court a new jurisdiction.

Per Curiam.—That case occurred before the late act of 2 Will. 4, c. 39. This is subsequent to it. That act gives this Court jurisdiction by writ of summons. In the former case, the proceeding was by *quo minus*. Why was it necessary, that the declaration should have a statement that the plaintiff was a debtor to the King, but to correspond with the *quo minus*, and to shew the jurisdiction of this Court? Here the declaration conforms with the writ.

Judgment for the plaintiff (a).

(a) On the same day, *Jervis*, on moving for judgment against the casual ejector, mentioned to the Court that the officers had refused to take in the declaration, because *John Doe* was not stated to be a debtor to the King. The Court held, it was no objection.

HUME v. LIVERSEDGE and Others.

To debt on a bail-bond, a plea that there was no proper affidavit of debt is bad on special demurrer.

TO debt on a bail-bond, which averred, in the usual way, that the writ was duly marked and indorsed for bail, for a certain sum; the defendant pleaded that no *proper* affidavit of the cause of action, to the amount of the said sum, was ever made or filed of record, &c. To this plea the plaintiff demurred specially.

Erle was called upon by the Court to support the plea. He contended, that the word “proper” was equivalent to “valid.” There is no other way of taking advantage of the want of such an affidavit except by pleading; as it has been held not to be necessary to state it in the declara-

tion. *Wilcoxon v. Nightingale* (a), *Sharpe v. Abbey* (b).
He also cited *Rogers v. Jones* (c), *Hughes v. Jones* (d).

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BAYLEY, B.—Those were actions for escape, and are no authority on the question before us: it was necessary in those cases to shew a legal arrest; for, if there was no arrest, the party was not in custody, and there was no escape.

Erle.—In those cases, the affidavit appeared good on the face of it, but was made bad by extrinsic evidence.

LORD LYNTHURST, C. B.—Suppose an affidavit which is defective in form merely?

Erle.—If the plaintiff had taken issue on this plea, and produced such an affidavit, the issue must have been found for him. An improper affidavit is as no affidavit.

BAYLEY, B.—The plaintiff might yet have a right to demur.

Erle.—The objection to the word “proper” is not specified in the demurrer; it merely says, that no certain or proper issue can be taken upon it: that is not sufficiently explicit.

Addison, in support of the demurrer, cited *Nightingale v. Cox* (e), in which it was held, that, even in an action against a sheriff for an escape, it was sufficient to allege that the writ was duly indorsed for bail, without adding “by virtue of an affidavit duly made, and filed of record.”

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| (a) 1 M. & P. 279; S. C. 4 Bing. 501. | C. 86. |
| (b) 2 M. & P. 312; S. C. 5 Bing. 193. | (d) 1 Barn. & Ad. 388. |
| (c) 9 D. & R. 878; S. C. 7 B. & | (e) 5 M. & R. 169; S. C. 10 B. & C. 202, in error. |

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He contended, that, even if the word "proper" had not been in the plea, it would still be bad; and quoted the concluding observations of Mr. Baron *Bayley*, in giving the judgment of the Court in that case.

Per Curiam.—We think this plea is bad on demurrer, and that the cause is sufficiently assigned, that no certain or proper issue can be taken upon it; for it is uncertain what is meant by a proper affidavit. An affidavit might be defective so as to enable the defendant to apply to set it aside, and yet might be good if that opportunity was lost. The proper course would have been, to state that there was no affidavit, except &c., setting it out; the Court would then have been enabled to judge whether it was proper or not.

Judgment for the plaintiff.

SHORT v. CUNNINGHAM.

SAME v. POUND.

If a plaintiff, after making an affidavit of debt, receive part of the debt, and the debt is thereby reduced to an amount insufficient to warrant an arrest, and the defendant is, notwithstanding, afterwards arrested for the whole debt, the bail-bond will be ordered to be set aside with costs.

THERE were two actions on a bill of exchange for 25*l.*; one against the acceptor, the other against the drawer.

D. Wakefield had obtained rules calling on the plaintiff to shew cause why the bail-bonds given by the defendants should not be delivered up to be cancelled, with costs to be paid by the plaintiff; and why all proceedings on the bail-bonds should not be stayed. The affidavit in support of the motion stated, that the acceptor, finding that the plaintiff was about to proceed upon the bill, wrote to the plaintiff, offering to pay 10*l.* on account of the bill. The plaintiff's attorney thereupon wrote to the acceptor, telling him that a writ had been sued out, and that he should pro-

ceed. That the acceptor then called on the plaintiff with the 10*l.*, and saw his wife, and told her he came to pay 10*l.* on account of the bill. The wife received the money. In a few days afterwards the defendants were both arrested for 25*l.* on the bill of exchange.

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Platt shewed cause, upon an affidavit of the plaintiff's wife, that the acceptor paid the money to her generally; and the plaintiff's affidavit stated, that he had a further demand against the acceptor, and that he had applied the 10*l.* in liquidation of that demand. He contended also, that the affidavit of debt having been made before the payment of the 10*l.*, the plaintiff had a right to proceed upon it.

Per Curiam.—The debtor has a right to apply a payment to any demand he pleases. The plaintiff has two demands against the acceptor. He writes, and says he shall pay 10*l.* on one account. He pays it, and nothing material is said at the time. The plaintiff does not refuse to accept it on the footing of the letter. The letter having specifically appropriated it, the plaintiff should have specifically said, he should not receive it on account of the bill of exchange. Though the affidavit was made before the payment, yet, before the arrest, the debt having been actually reduced to 15*l.*, the plaintiff had no right to arrest for 25*l.* It was a breach of faith, and the rule must be absolute.

Rules absolute, with costs.

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DEWHIRST v. PEARSON.

To justify an officer in taking a defendant to a public-house, contrary to the 32 Geo. 2, c. 28, it is not suffi-

cient for him to shew that the prisoner did not express his dissent.

A defendant arrested cannot be taken to gaol within twenty-four hours, unless he has refused to name a house to be taken to.

The sheriff, or any of his officers or servants concerned in acting contrary to that act, is liable to the penalty.

THIS was an action for penalties incurred under the 32 Geo. 2, c. 28, sect. 1 (a).—The declaration in the *first* count stated, that heretofore, to wit, on the 3rd day of No-

(a) The act—after reciting that many persons suffer by the oppression of inferior officers in the execution of process for debt, and the exaction of gaolers to whom such debtors are committed, and that, for remedy thereof, it may be reasonable, not only to enforce the execution of the laws now in being against such oppressions and exactions, more especially several clauses in the 22 & 23 Car. 2, c. 20—enacts, “that no sheriff, under-sheriff, bailiff, serjeant at mace, or other officer or minister whatsoever, shall, at any time or times hereafter, convey or carry, or cause to be conveyed or carried, any person or persons by him or them arrested, or being in his or their custody, by virtue or colour of any action, writ, process, or attachment, to any tavern, alehouse, or other public victualling or drinking house, or to the private house of any such officer or minister, or of any tenant or relation of his, without the free and voluntary consent of the person or persons so arrested, or in custody; nor shall carry any such person to any gaol or prison,

within four and twenty hours from the time of such arrest, unless such person or persons so arrested shall refuse to be carried to some safe and convenient dwelling-house of his, her, or their own nomination or appointment, within a city, borough, corporation, or market town, in case such person or persons shall be there arrested, or within three miles from the place where such arrest shall be made, if the same shall be made out of any city, borough, corporation, or market town, so as such dwelling-house be not the house of the person arrested, and be within the county, riding, division, or liberty, in which the person under arrest was arrested; and then and in such case it shall be lawful to and for any such sheriff or other officer or minister, to convey or carry the person or persons so arrested, and refusing to be carried to such safe and convenient dwelling-house as aforesaid, to such gaol or prison as he, she, or they may be sent to, by virtue of the action, writ, or process against him, her, or them.”

vember, 1831, there issued out of the Court of our said lord the King at *Westminster*, a certain writ, called a *capias ad respondendum*, at the suit of *William Venables, Alfred Wilson*, and *William Tyler*, against the plaintiff, by which said writ the sheriff of *Nottinghamshire* was commanded, that he should take the plaintiff, if he should be found in his bailiwick, and him safely keep, so that he might have his body before the justices of our said lord the King at *Westminster*, on *Friday*, the 25th day of *November* then next ensuing, to answer to the said *W. V., A. W., and W. T.*, in a plea, wherefore with force and arms the close of the said *W. V., A. W., and W. T.*, at *Mansfield*, he broke, and other wrongs to him did, to the great damage of the said *W. V., A. W., and W. T.*, and against the peace of our said lord the King; and also, that the said plaintiff might answer to the said *W. V., A. W., and W. T.*, according to the custom of his said Majesty's Court of the *Bench* in a certain plea of trespass on the case upon promises, to the damage of the said *W. V., A. W., and W. T.*, of 70*l.*; and that the said sheriff would have there that writ; which said writ, afterwards and before the delivery thereof to the said sheriff of *N.*, as hereinafter mentioned, to wit, on &c., aforesaid, in the county of &c., was duly marked and indorsed for bail for 32*l.*, according to the form of the statute in such case made and provided, and which said writ so indorsed as aforesaid, after and before the return thereof, to wit, on &c., last aforesaid, in the county aforesaid, was delivered to *Thomas Moore*, Esquire, who then, and from thence until and at and after the committing the offence hereinafter next mentioned, was sheriff of the county of *N.*, to be executed in due form of law; by virtue of which said writ the said *T. M.*, Esquire, so being sheriff of the said county of *N.*, as aforesaid, after and before the return thereof, to wit, on &c., in &c., aforesaid, for having execution of the said writ, duly made his warrant in writing, directed to the defendant, who then, and from thence until

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and at and after the committing of the offences hereinafter mentioned, was bailiff of the said sheriff of the said county of *N.*; by which said warrant the said sheriff of the said county of *N.* commanded the defendant to take the plaintiff, if he should be found in his bailiwick, and him safely keep, so that the said sheriff might have his body before the said justices of our said lord the King at *Westminster*, at the return of the said writ, to answer to the said *W. V.*, *A. W.*, and *W. T.*, in the plea aforesaid; which said warrant was also then and there marked for bail for *82l.*; and which said warrant so marked for bail, after and before the said return of the said writ, to wit, on &c. last aforesaid, in &c. aforesaid, was delivered to the defendant, then being one of the bailiffs of the said sheriff of the said county of *N.*, to be executed in due form of law; by virtue of which said writ and warrant, he, the said defendant, after and before the said return of the said writ, to wit, on &c., and within the bailiwick of the said sheriff, took and arrested the plaintiff by his body, and then and there had and detained him in his custody at the suit of the said *W. V.*, *A. W.*, and *W. T.*, for the cause aforesaid. That the plaintiff having been so arrested, and so being in the custody of the defendant, by virtue and under colour of the said writ and warrant, for the cause aforesaid, to wit, on &c. last aforesaid, in &c. aforesaid, he, the defendant, then and there being bailiff of the said sheriff of the said county of *N.*, as aforesaid, conveyed and carried the plaintiff so arrested, and so being in the custody of the defendant by virtue and under colour of the said writ and warrant as aforesaid, to a public victualling and drinking-house, situate and being in *East Retford*, in the county aforesaid, *without the free and voluntary consent of the plaintiff*, contrary to the form of the statute in such case made and provided, whereby, and by force of the same statute, the defendant then being bailiff of the said sheriff of the said county of *N.* as aforesaid, forfeited and became

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liable to pay for his said offence to the plaintiff, being the party thereby aggrieved, the sum of 50*l.*; and thereby, and by force of the said statute, an action hath accrued to the plaintiff, to demand and have of and from the defendant the said sum of 50*l.*, so forfeited as aforesaid, part of the said sum above demanded.

Second count.—That after the plaintiff had been so arrested, and whilst he remained in the custody of the defendant by virtue and under colour of the said writ and warrant for the cause aforesaid, to wit, on &c. aforesaid, in &c. aforesaid, he, the defendant, then and there being bailiff of the said sheriff of the said county aforesaid, carried the plaintiff so arrested, and so being in the custody of the defendant by virtue and under colour of the said writ and warrant as aforesaid, to a certain gaol or prison, to wit, the gaol or prison commonly called *Nottingham Gaol*, in the county aforesaid, *within twenty-four hours from the said arrest, to wit, within the space of twenty-two hours* from the time of the said arrest, without the free and voluntary consent of the plaintiff, *though he, the plaintiff, did not refuse to be carried to any safe and convenient dwelling-house of his own nomination or appointment within the town of East Retford*, such dwelling-house not being the house of the plaintiff, and the said town of *East Retford* then and there being a market town, and the place where the plaintiff was so arrested as aforesaid; contrary &c., whereby &c.

Third count.—That the plaintiff, before, and at the time of committing the offences hereinafter mentioned, had been arrested, and was then in custody of the defendant, (he, the defendant, then being one of the bailiffs of the sheriff of the said county of *N.*), under and by virtue of a certain writ called a *capias ad respondendum*, before then issued out of the said Court of our said lord the King of the *Bench* at *Westminster*, whereby the said sheriff was commanded that he should take the

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plaintiff, if he should be found in his bailiwick, and him safely keep, so that he might have his body before the justices of our said lord the King at *Westminster*, on *Friday*, the 25th day of *November* then next ensuing, to answer the said *W. V.*, *A. W.*, and *W. T.*, in a plea of trespass; and also, that the plaintiff might answer to the said *W. V.*, *A. W.*, and *W. T.*, according to the custom of his said Majesty's Court of the *Bench*, in a certain plea of trespass on the case, upon promises, to the damage of the said *W. V.*, *A. W.*, and *W. T.*, of 70*l.*, and that the said sheriff should have there that writ, and upon and by virtue of a certain warrant then made and granted by the said sheriff on the said last-mentioned writ, directed to the said defendant for taking and arresting the plaintiff on the said last-mentioned writ, and which said last-mentioned writ and warrant had been and were before then indorsed for bail for 32*l.*, according to the form of the statute in such case made and provided: that the plaintiff, having been so arrested, and so being in custody of the defendant by virtue and under colour of the said last-mentioned writ and warrant, for the cause last aforesaid, to wit, on &c. last aforesaid, in the county aforesaid, he, the defendant, then and there being bailiff of the said sheriff of the said county of *N.* as last aforesaid, *conveyed and carried the plaintiff* so arrested, and so being in the custody of the said defendant, by virtue and under colour of the said writ and warrant as last aforesaid, *to a public victualling house*, situate and being as last aforesaid, in the county aforesaid, *without the free and voluntary consent of the plaintiff*, contrary &c., whereby &c.

Fourth count.—That, after the plaintiff had been so arrested, and whilst he remained in custody of the said defendant, by virtue and under colour of the said last-mentioned writ and warrant for the cause last aforesaid, to wit, on &c. aforesaid, in the county aforesaid, he, the defendant, then and there being bailiff of the said sheriff as last aforesaid,

carried the plaintiff so arrested, and so being in the custody of the defendant, by virtue and under colour of the said last-mentioned writ and warrant as aforesaid, to a certain gaol or prison, to wit, the gaol or prison commonly called Nottingham Gaol, in the county aforesaid, within twenty-four hours from the time of the said last-mentioned arrest, to wit, within the space of twenty-two hours from the time of the said last-mentioned arrest, without the free and voluntary consent of the plaintiff, contrary &c., whereby &c.

At the trial, before *Vaughan, B.*, at the last Assizes for *Nottinghamshire*, it appeared from the evidence, that the warrant mentioned in the declaration was directed to the defendant and *Watmough*. That the names are sometimes specified in the warrant, and sometimes not. *Pearson*, the defendant, was a sheriff's officer; *Leadbeater* and *Watmough* were not bound bailiffs, but only assistants to *Pearson*. On the morning of *November 25th*, *Pearson* sent his son to *Leadbeater* with the warrant, and with directions to execute it forthwith, and to use dispatch. A coach comes through *East Retford*, where the plaintiff was arrested; and the object was to allow twenty-four hours to elapse, so that he might be sent by that coach to *Nottingham* on the next morning, if he could not get bail. The plaintiff was arrested by *Leadbeater*, who said to the plaintiff, "you must go with me to the *Granby*," (meaning a public-house with the sign of the Marquis of *Granby*, about two hundred yards off); the plaintiff said, "very well," and made no objection or resistance; nor did he express any wish to go to any other house, nor was he asked whether he had any objection to go there, or wished to go to any other house. No copy of the act was shewn to him. One of the plaintiff's witnesses told *Leadbeater*, he would get into trouble, as he had no right to take him to a public-house. The next morning, the plaintiff having ineffect-

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ually endeavoured to get bail, was taken to *Nottingham Gaol* by the coach, accompanied by *Watmough*, who delivered him to the gaoler there. *Pearson* was proved to have been standing by at the time, and pointed significantly to the plaintiff's family, who were standing near. The plaintiff and some of his witnesses had often been arrested by the defendant. The plaintiff proceeded for two penalties. *First*, for taking him to a public-house without his free and voluntary consent; and, *secondly*, for carrying him to prison within twenty-four hours, though he had not refused to be carried to some safe and convenient place of his own nomination.

The learned Judge left two questions to the jury. *First*, was he taken to the public-house without his free and voluntary consent? The jury found, that he was not taken to the *Marquis of Granby* without his consent. Upon the *second* point, the learned Judge expressed his opinion, that the plaintiff was properly taken to prison within twenty-four hours, if he neglected to nominate; but, as there was a doubt upon the evidence whether twenty-four hours had not elapsed before he was taken to the coach, he left it to the jury to find upon that point. The Jury found that he had been arrested only twenty-three hours and a half; and they found a verdict for the defendant.

A rule *nisi* having been obtained on the ground of misdirection by the learned Judge, the case was argued at great length, principally upon the construction of the act, by Serjt. *Adams*, *N. Clarke* (for *Clinton*), and *Humfrey*, for the defendant; and by *Hill* and *Waddington*, for the plaintiff.

For the plaintiff it was contended, on the first question, that there was no evidence of the free and voluntary consent of the plaintiff; that a negative or implied consent was not sufficient; that there must be an actual consent or dissent;

and *The Apothecaries' Company v. Bently*(a), was cited. On the other side it was said, that the objection to go to a public-house ought to have been expressed by the plaintiff, and that his silence was equivalent to a consent.

Upon the other point, two questions were raised:—whether the “taking to gaol” meant the lodging in gaol, or the taking to the coach; and what was a refusal to be carried to a place of his own nomination.

For the defendant, it was contended that the words “taking to gaol” referred to the very time of his being put into the gaol; and that, as the plaintiff neglected to nominate any safe house, it was equivalent to a refusal, and the defendant was justified in sending the plaintiff to gaol when the twenty-four hours had so nearly elapsed; and, that there was no way of ascertaining when the time for nominating would arise. On the other hand, it was said, that if the words “taken to gaol” meant the lodging in prison, the object of the act would be defeated, as in some parts of the country the whole twenty-four hours would be occupied in taking the prisoner to gaol, and he would be deprived of the opportunity of getting bail, or procuring the assistance of friends in the place where he was arrested, if he might be hurried away immediately; and, that he had the whole twenty-four hours in which he could name a house to be taken to.

Another objection was raised by the defendant's counsel, as to the liability of *Pearson*. It was contended, that the action ought either to have been against the person who actually did the wrong, or against the sheriff; that the warrant being directed to *Watmough* as well as *Pearson*, one was as much a principal as the other; and that there was nothing to connect *Pearson* with the wrongful acts of *Leadbeater* and *Watmough*.

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(a) 1 R. & M. 159.

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The Court overruled the objection, and thought there was sufficient to implicate *Pearson*; and they referred to *Woodgate v. Knatchbull* (a), *Peshall v. Layton* (b), and *Attorney-General v. Siddon* (c).

The Court, consisting of *Bayley*, *Vaughan*, and *Gurney*, Barons, took time to consider; and afterwards expressed their opinion that the case ought to go down again to a jury. *Bayley* and *Gurney*, B.s, expressing their opinion, that there was not sufficient evidence of a free and voluntary consent by the plaintiff; and that he could not be said, under the circumstances, to have refused to go to a place of his own nomination. *Vaughan*, B., said, that he did not acquiesce in the argument for the plaintiff, that an express and positive consent was necessary.

Rule absolute for a new trial (d).

(a) 2 T.R. 148, 158.

(b) Id. 712.

(c) 1 C. & J. 220.

(d) See *Pitt v. Sheriff of Mid.*

deses, in a cause of *Hamilton v. Jones and Others*, 4 M. & P. 726, ante, p. 201, S. C.

FORBES v. KING and Others.

A count, in an action for libel, charging that the defendant wrote of the plaintiff that he was a "man Friday" to ano-

ther, was held bad, for want of an averment to shew, that, by the term *Friday*, as applied to the plaintiff, degradation and subserviency were intended to be imputed to him.

To write of a man that he has been engaged in a gambling fracas arising out of a dispute at play, is not libellous, without an averment that *illegal* gambling and play were intended by the libel.

THIS was an action for libel, brought by Captain *Forbes* against the publishers of the *Satirist* newspaper. The fifth and eleventh counts were demurred to. The fifth count was upon the following paragraph:—" *Langford* was con-

versing with his man *Friday* the other day, on the subject of the slave trade, and enumerating instances of peculiar endowments among the black population. 'Yes,' observed *Forbes*, 'the history of *Hayti* affords ample proof that they are equal to us in intellectual endowments.' 'You know, *Forbes*, I fear, but little of history,' remarked his lordship, looking into the History of *England*; 'you will there read an account of a black prince who was the greatest soldier of his time.'" The libel was set out with the usual innuendoes, but without any introductory averments.

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Mansel was called on by the Court to support the count. He contended, that, to write of another that he was a "man *Friday*," was actionable. It was an imputation that he was a mere tool, and in a state of subserviency to another; and was calculated to degrade him in public estimation. [Lord *Lyndhurst*, C. B.—There is no innuendo to apply it in that way. We cannot take notice of "*Friday*." If you had stated, by way of innuendo, that by "man *Friday*" was meant to be imputed degradation to the plaintiff, that might have been sufficient.] They speak of the black population. [*Gurney*, B.—You do not state you are white. *Bayley*, B.—A man may be black, and be a subject of this realm.] You would not call a subject of this realm a member of a black population. I submit, that no one can read this paragraph without seeing that its evident object and tendency is to degrade and vilify the plaintiff.

The eleventh count was upon the following statement:—"Gambling Fracas.—There was a prevalent rumour in the fashionable circles yesterday, that, in consequence of a dispute at play between Mr. *Hugh* (calling himself Captain) *Forbes*, and Mr. *Tarlton*, a gentleman well known in the fashionable world, a meeting was decided on between the mutual friends of the parties, Messrs. *Summers* and *Barnard*, and the affair was to come off on *Putney Heath*, at

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day-break, on *Thursday* morning. Mr. *Tarleton* and his friend, Mr. *Summers*, were on the ground, anxiously waiting the arrival of Messrs. *Forbes* and *Barnard*, but these gentlemen did not appear. The disappointment, as may be well imagined, excited in the minds of the attendant gentlemen no very agreeable feelings; and, as soon as it was deemed advisable to leave the ground, Mr. *Summers* proceeded in search of *Barnard* (*Forbes's* second), in order to obtain an explanation of the violation of an engagement that had been settled on all hands, and is usually considered binding. Words led to blows, and blows to a very severe punishment, administered *à la Cribb* on the *corpus* of *Barnard* by Mr. *Summers*. We will not now enter on the question further." There were no introductory averments.

Mansel, in support of the count.—This is a libel tending to hold up the plaintiff to ridicule and degradation. It is headed "Gambling fracas." Gambling cannot be innocent. To write of a man that he is a gambler, is, I submit, actionable. [*Bayley*, B.—Gambling is playing. There may be innocent gambling. Does every dispute at play degrade or make a man contemptible?] He is stated not to have appeared at the ground. [*Bayley*, B.—He did right. Lord *Lyndhurst*, C. B.—He did not do what was illegal. He never agreed to it; his second did for him.] It is an imputation upon us to state, that we were engaged in the transaction. [*Bayley*, B.—That is, that you were engaged in play. There is no other point.] Does not this account hold the plaintiff up to ridicule, and tend to degrade him?

LORD LYNTHURST, C. B.—Whether or not a count could be framed upon this statement we do not say. You do not shew that he was engaged in illegal play.

BAYLEY, B.—Undoubtedly, to write of a man what will

degrade him in society, is actionable. Here, if you had alleged that illegal play was meant, that might have done.

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Judgment for defendant.

Hutchinson appeared to support the demurrer.

DEACON v. FULLER.

MANSEL moved for a rule to shew cause why a rule for a new trial should not be discharged. In this case, the defendant had obtained a verdict; but a rule for setting aside that verdict, and for a new trial, had been made absolute in *Hilary* Term, 9 *Geo.* 4. In answer to a question by the Court, whether a term's notice had been given, it was stated, that, in *December* last, an order for changing the attorney had been made by Mr. Baron *Vaughan*, by consent of the opposite attorney: this was all that had been done. A term's notice is not necessary where you seek to end proceedings (a). A notice of trial has been held sufficient within the twelve months (b). He also referred to *Tipton v. Meeke* (c).

A motion to set aside a rule for a new trial cannot be made after the lapse of four terms without a term's notice.

Obtaining an order for changing the attorney is not such a step as will prevent the necessity of such a notice.

Semble, that such a motion cannot be made.

The Court expressed themselves against the motion upon principle; but they said, it was a sufficient objection that a term's notice had not been given, which they held to be necessary; and that the order for changing the attorney was no step in the cause. The defendant's course was to take the cause down by proviso.

Rule refused.

(a) *Theobald v. Crickmore*, 1 Chit. R. 317; *May v. Wooding*, 8 M. & S. 500; *Tidd*, 903, note (k). (b) See *Hutchell v. Griffiths*, 2 Salk. 645. (c) 8 B. M. 579.

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COOK v. ALLEN.

The plaintiff may enter an appearance for the defendant at any time within twelve months, and is not limited to the term after the return of the writ of *quo minus*.

ON the 2nd of *May*, a *quo minus* was served on the defendant, returnable on the 3rd. Four days' time to pay debt and costs was indorsed. On *November* 2nd, an appearance was entered for the defendant by the plaintiff. The declaration was filed on the 20th, and a rule to plead in eight days was served on the 22nd. On *December* 5th, a notice to tax costs on the 7th was given, and execution issued on the 11th. On the 15th, defendant gave notice to the plaintiff that his proceedings were irregular, and that a summons was taken out for setting them aside, which was attended before Mr. Baron *Bolland*, on the 17th, who referred them to the Court.

J. Jervis having obtained a rule for setting aside proceedings for irregularity—

Watson now shewed cause.—The objection is, that the appearance was too late; that the plaintiff had only the vacation after the second term to enter an appearance; but the defendant is now too late to take that objection. The plaintiff declared on the 20th. It does not appear when notice of declaration was given; but the rule to plead was given on the 22nd, and therefore the defendant had time to apply to the Court within the term to set aside the appearance. He was not justified in lying by till execution executed. But there is another answer. The practice of the *King's Bench* and *Common Pleas*, that the appearance must be within two terms, or in the vacation after, does not prevail in this Court. It may be entered at any time within the twelve months.

The Court here inquired of the officers, and two of them certified that such was the practice in the *Exchequer*.

J. Jervis, in support of the rule, contended that the practice in this Court was directly contrary to that of the *King's Bench* and *Common Pleas*, and cited *Price's Exchequer Practice* (a), where it is said, such an appearance may be entered by the plaintiff at any time before the end of the term after that in which the writ is returnable (and as of that term), but not afterwards; and he referred to *Smith v. Paynter* (b), and other cases, to shew that the Court has interfered, even though a longer time has elapsed than in the present instance. At all events, he urged that the Court would not give costs where there was a doubt about the practice.

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Per Curiam.—There is no doubt among the officers. You might have inquired of them in the first instance, and they would have informed you the proceedings were regular. Unless a *non pros* is signed, the plaintiff is not out of Court till the end of the year; and the delay in your application is not accounted for.

Rule discharged, with costs.

(a) Page 208.

(b) 2 T. R. 719.

NEWTON v. PEACOCK.

THIS was an action brought for the recovery of 4*l.*, according to the particulars of plaintiff's demand; and this sum was found to be due by the jury on the execution of a writ of inquiry in *London*. *Steer* had obtained a rule *nisi* for paying 4*l.* to the plaintiff, without costs.

To take advantage of a Court of Requests act, to deprive the plaintiff of costs, the defendant must bring himself directly and expressly within the words of the act; and, there-

fore, if he merely swears "that he keeps a counting-house or warehouse," the act only specifying "warehouse," and leaves it doubtful whether he seeks his *whole* livelihood within the limits of the act, he does not shew sufficient to entitle the Court to interfere to deprive the plaintiff of costs.

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Hutchinson shewed cause.—From the affidavits it appeared, that the defendant bought at a sale by auction two parcels of stone blue; the one at 4*l.* 17*s.* 6*d.*, the other at 4*l.* The first was paid for, but not the last. The defendant disputed his having received the latter parcel. The affidavits were contradictory as to the place where the goods were directed to be sent; but, it appeared, that, in the *Lower Deptford Road*, there was the name of “*J. G. Peacock*, stone blue manufacturer,” which the defendant swore was his father-in-law. This was out of the city of *London*, and the plaintiff swore that he did not know the defendant had any place of business in the city. The plaintiff’s counsel contended that the case was within the *London Act* or the *Deptford Act*, (but the *London Act* appeared on the affidavits to be out of the question); and that, as there was no fraud shewn, he was entitled to the protection of the latter act. For the defendant it was contended, that the plaintiff had not brought himself within the act. It is unnecessary to detail the arguments of counsel, as the reasons for the judgment are fully stated by the Court.

BAYLEY, B.—This rule ought to be discharged upon the plain language of the act, as contrasted with the defendant’s affidavit. The statute (*a*) describes the persons liable to the jurisdiction of that act as “residing or inhabiting within the said hundreds, or either of them; or keeping any house, warehouse, shop, shed, stall, or stand, or seeking a livelihood, or trading, or dealing within the said hundreds.” You are to look at the language of these descriptions, and see if the defendant has brought himself within it. He describes himself as “carrying on business at *All-hallows Lane* for some years, and that he keeps a counting-house or warehouse, (not saying which, but in the alternative, a *counting-house* not being mentioned in the act),

(*a*) 47 Geo. 3, sess. 1, chap. iv., sect. 5, the Deptford Act.

for the reception of goods at such counting-house or warehouse in the way of his business, and attends in business hours. That he has there more goods and property than sufficient to pay the 4*l.* and costs; and that the said counting-house or warehouse is in *London*." He does not state that he gets his livelihood there; he must get his *whole* livelihood there. He goes on and states, that "he is merely a lodger at his father's house, and that his general place of business is at *Allhallows Lane*;" but he does not negative his occasionally carrying on business at *Deptford*. Then, he gives his address at *Deptford*, and describes himself as a blue manufacturer, and directed the goods to be delivered at *Allhallows Lane*. On his own affidavit, he has not brought himself distinctly within the act; he ought to have had the act before him at the time of making his affidavit. He does not say positively that he has a warehouse.

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VAUGHAN, B.—He must bring himself directly and expressly within the act.

The other Barons concurred.

Rule discharged.

FORBES v. GREGORY and Others.

THIS was an action for libel: there were ten defendants; three of them demurred to some of the counts, and went to issue upon the rest of the declaration: the other defendants did not demur, but pleaded. The demurrer was argued in this term, and judgment given for the three defendants, who immediately gave notice to the plaintiff that they should proceed to tax their costs on the demurrer.

Where some defendants demurred to some of the counts of a declaration, and the other defendants went to issue upon them, and all the defendants went to issue upon the other counts, and those defen-

dants who demurred got judgment upon the demurrer before the issues were tried:—*Held*, that they were not entitled to have their costs taxed upon that judgment, under the 8 & 9 W. 3, c. 11.

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Mansel obtained a rule *nisi*, to set aside the notice of taxation, on the ground that they were not entitled to costs, under the 8 & 9 *Will.* 3, c. 11, s. 2; and he cited *Astley v. Young* (a), recognised in *Postan v. Stanway* (b). He contended, that that act did not apply to actions on the case; and that they were at all events premature, until a *nolle prosequi* had been entered.

Hutchinson shewed cause.

The Court took time to look into the authorities, and afterwards they made the—

Rule absolute.

(a) 2 Burr. 1233.

(b) 5 East, 161.

HILLS v. WARNER.

The terms of a written undertaking cannot be varied by parol unless there is fraud.

THE defendant had been arrested by the plaintiff for 400*l.*, and the defendant's attornies gave a written undertaking, that, in consideration of the plaintiff's discharging the defendant out of custody, they would, if the money was not paid within a certain time, put in bail for the defendant, or render him. The money not having been paid—

Manning obtained a rule, calling upon the attornies to shew cause why they should not pay the money in pursuance of their undertaking, or put in good bail.

Chilton shewed cause.—He produced an affidavit of the attornies, that the undertaking was given on the express understanding that they were not to be liable to pay the money, until they had received certain money recovered in

an action against other persons, in which one of the attorneys was the plaintiff. He contended, that though he might not be able to avail himself of such a stipulation, if an action were brought, yet, upon an application like this, the Court would not interfere till they had received the money, on the faith of which they agreed to become security.

Per Curiam.—You cannot vary by parol the terms of a written contract: all the mischief of admitting parol evidence applies equally to this case as to any other. There is no case where you can vary the terms unless they are written fraudulently.

Bail to be put in, and rule enlarged for a week.

WOOSMAN v. WOOD.

THIS was an action on an attorney's bill. The defendant had given a bail bond, and an order had been made by *Bayley, B.*, that the bill should be taxed. The clerk had drawn up the order as a stay of proceedings. Nothing was done upon the order, and it was then agreed between the plaintiff and defendant that the bill should not be taxed. A rule had been obtained by the bail, calling upon the plaintiff to shew cause why the bail bond should not be given up to be cancelled: against which

Platt shewed cause.—The bail are not prejudiced, because the order of Mr. Baron *Bayley*, which is drawn up as a stay of proceedings, was so drawn up by mistake; and, as there was no stay, their only mode of getting rid of their liability was, by putting in and perfecting bail above, who might have rendered the defendant.

BAYLEY, B.—No. But the bail are prejudiced by the

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HILLS
v.
WARNER.

Where, in the course of a cause, an order was made for taxing the bill on which the action was brought, and which by mistake was drawn up as a stay of proceedings:—*Held*, that the bail could not avail themselves of that order as a giving of time, so as to discharge them.

An agreement between the plaintiff and defendant, that the plaintiff's bill should not be taxed:—*Held*, not binding upon the bail.

1833.
WOOSMAN.
v.
WOOD.

agreement not to tax, and they are entitled to every opportunity to reduce the amount.

Platt.—The bail are bound by the acts of the principal; and, if he does not choose to dispute the amount of his debt, the bail cannot.

Jervis, contra.—The bail are prejudiced by a stay of proceedings.

BAYLEY, B.—You cannot contend that you can take any advantage of the mistake in drawing up the order.

Jervis.—The bail then are prejudiced by being unable to tax the bill.

BAYLEY, B.—We can mould our own rule, and make it part of the order, that they may be at liberty to tax the bill.

Knowles, on the same side, was commencing to argue that the Judge's order operated as a stay of proceedings.

BAYLEY, B.—It is quite useless to contend that point.

Knowles.—If the conduct of the parties in the suit is such as to lead the bail to believe that they need not put in special bail, they are prejudiced; here the conduct was such as to induce them to act upon that belief. The agreement is a fraud upon the bail. He cited *Clift v. Gye* (a), in which it was held, that, where a plaintiff, with the consent of the bail to the sheriff, took a *cognovit* with a stay of execution for a month, although the bail continued liable (the debt not having been paid), yet the plaintiff could not take proceedings against them, without giving them notice that the *cognovit* was unsatisfied.

(a) 9 B. & C. 422.

BAYLEY, B.—That case is not in point. Bail above are at liberty to render their principal; bail to the sheriff are not (a).

1833.
 WOOSMAN
 v.
 WOOD.

Per Curiam.—The rule must be discharged, but without costs. The bill to be taxed.

(a) But see *Charleton v. Morris*, 4M. & P. 114; *S. C.* 6 Bing. 427, where the principle adopted in *Clift v. Gye* was applied to a case of bail above.

FOSTER and Others v. BURTON.

THIS was an action for 18*l.* 18*s.* 6*d.*, the balance due for goods sold. On *October* 26th, a *quo minus* issued against the defendant; on *November* 4th, the defendant's attorney called on plaintiffs' attorney, and offered to give a *cognovit* for debt and costs, which was refused; he then offered a *cognovit* and to pay the costs down; this was agreed to. The *cognovit* was given, payable in a month; but the costs were not paid; and a declaration was delivered on the 17th, with notice to plead in eight days: the defendant demurred specially, assigning for cause that no venue or term was stated, and also want of form. Application was made to *Vaughan*, B.; and the learned Judge, thinking the demurrer to be groundless, made an order for quashing it, and for signing judgment: this order was made on *December* 3rd. The defendant had demanded back his *cognovit*, but it was not returned. On the 4th, he ruled the plaintiff to reply. On the 10th, another order was made for quashing the rule to reply, and final judgment was then signed. The defendant gave notice that he should move the Court to set aside the orders; on the 12th, the costs were taxed; the defendant's attorney attended and paid the costs under a protest. A rule *nisi* having been ob-

A Judge at chambers having, in an action of *assumpsit*, ordered a sham demurrer to be set aside, and judgment signed, under which final judgment was signed without an interlocutory judgment, and the debt and costs levied, the Court set aside that order.

1833.
 FOSTER
 v.
 BURTON.

tained by *Mansel* for setting aside those orders and all subsequent proceedings, and for returning the debt and costs—

Cowling shewed cause.

LORD LYNTHURST, C. B.—You abandon the *cognovit* because the costs are not paid, and proceed in the action: can a Judge at chambers quash a demurrer carrying on the face of it the appearance of falsity? Suppose it were a sham demurrer, the party would have a right to plead.

Cowling.—He has such a power: this Court could order a demurrer to be quashed, and a Judge at chambers has the same power.

BAYLEY, B.—That has been a question; it has arisen here before upon two orders, one of Baron *Garrow*, and another of Baron *Vaughan*.

Cowling referred to *Doe d. Prescott v. Roe (a)*, that a Judge has authority to order costs to be paid.

Mansel, *contra*, cited *Read v. Lee (b)*, in which the Court of *King's Bench* held that a Judge had no such power. Here final judgment has been signed in an action of *assumpsit*, without an interlocutory judgment, under which we have been compelled to pay the costs.

The Court ordered both orders to be set aside. It was agreed that the debt and costs up to the time of the declaration should be retained, the plaintiff not to have any subsequent costs, or the costs of the *cognovit*.

Rule absolute.

(a) 2 M. & Scott, 119; S. C. 9 Bing. 104. (b) 2 B. & Ad. 415.

1833.

BOWRING v. BIGNOLD.

THIS was an action of covenant on a policy under seal. The insurance was on the life of a farmer, resident in *Somersetshire*. It was stated that he had died of an inflammation on the lungs. The question raised upon the pleadings was, whether it was an insurable life.

In an action on a policy of insurance, where the question to be decided required the opinions of medical men of skill, the Court would not change the venue to another county, though all the witnesses as to facts resided there, except upon certain terms.

Follett having on a former day obtained a rule *nisi* to change the venue from *London* to *Somersetshire*, on an affidavit that all the witnesses resided in *Somersetshire*—

It is in the discretion of the Court whether they will allow the venue to be changed after an order for time to plead on terms.

Law shewed cause, and contended, in the first place, that this application came too late, they having obtained time to plead on the terms of pleading issuably, and taking short notice of trial; and he cited the case of *Notts v. Curtis* (a), to that effect. [*Bayley, B.*—That was on the common affidavit.] *Secondly*, the affidavits shew that we should require the attendance of eminent medical men in *London*, who would not be induced by any consideration to leave *London*.

The Court suggested that the affidavits on both sides were defective, in not shewing whether the medical men were to speak to facts, or merely to give their opinions. The case stood over, that the affidavits might be amended in that particular. On this day the motion was again renewed. The affidavits in support of the motion stated that the medical men to be called for the defendant were to speak to facts.

Law.—We have no affidavits that our medical witnesses are to speak to facts; because they would be required to

(a) 2 Tyr. 449, (n.); and 2 Cr. & Jerv. 345, S. C.

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BIGNOLD.

give their opinion upon the facts stated. By a former affidavit, it appears, that, on the other side, they have retained all the leading counsel.

Follett, in reply.—I understood, that, if the witnesses spoke to facts, the application might be made. All the witnesses as to facts are in *Somersetshire*, and none in *London*. There must be plenty of medical men in *Somersetshire*.

Per Curiam.—If the rule is made absolute, they must have the option of selecting one of the leading counsel to whom you have given general retainers. They ought also to have the option of taking down one medical man at your expense. If these terms are acceded to, the rule will be absolute; otherwise, discharged.

KING v. SKIFFINGTON, Bart.

A writ of summons being, to answer the plaintiff "in an action of trespass on the case," followed by a declaration in *assumpsit*, is irregular, and may be set aside.

LAW on a former day had obtained a rule calling upon the plaintiff to shew cause why the proceedings should not be set aside for irregularity. He objected to the form of the writ of summons, which was to answer the plaintiff in an action of trespass on the case. By the 2 *Will.* 4, c. 39, s. 1, it was directed, that the process in all personal actions should be according to the forms given by that act. In those forms the words "trespass on the case," do not occur; they describe the actions to be "on promises," or, "in debt," &c., *as the case may be*. He contended that the words "trespass on the case," ought to have been omitted. It should have been described, an action on promises. He also objected, that, as the declaration described the action to be an action of trespass on the case upon promises, there was a variance between the writ and the declaration, as the

words trespass on the case, would import an action of *tort*, while the declaration was clearly in *assumpsit*. He contended that the parties were precluded since the late act from adopting the old forms. He objected also to the notice of declaration, which omitted promises altogether, and was signed — *King*, attorney for plaintiff; whilst the writ was signed, plaintiff in person.

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KING
v.
SKIFFINGTON.

BAYLEY, B., thought there was nothing in the last objection, there being no form prescribed for the notice of declaration.

Hutchinson shewed cause.—Formerly, a plaintiff might have his writ for any cause of action, and declare for any other cause. Here, the writ is general, in a plea of trespass on the case. The act merely says, in an action on promises, debt, &c., as the case may be. The declaration points out particularly the form of action. He contended that the act was merely directory.

Per Curiam.—The act gives a form of writ which particularly specifies the species of action, as, on promises, or, in debt, &c., as the case may be. When you say in case, you may mean one of two forms of action, and therefore do not specify the form of action with sufficient precision; the forms must be adhered to.

Rule absolute, but without costs, being a new point (a).

(a) On Thursday, January 31st, proceedings were set aside, with costs, on a similar objection. The writ of summons and notice of declaration, were “trespass on the

case,” and the declaration was in trespass.

Mansel for the defendant. *Harrison* shewed cause.

1833.

HALLETT *v.* AUREY and STONE.

It is not sufficient for a defendant, on moving to set aside proceedings on a bail bond, to swear that the defendant in the original action has a good defence, even though he be an infant: he must swear to merits.

ERLE, in shewing cause against a rule obtained by *Es-pinasse*, for setting aside proceedings on a bail bond, objected that the affidavit in support of the rule merely stated that *Stone*, who was an infant, had a good defence to the original action; but it was not stated that he had a defence on the merits.

Per Curiam.—That is imperatively necessary. You must swear to merits.

Rule discharged, with costs.

SMITH *v.* MACDONALD.

Though the Court will not in general grant a *distringas* except on an affidavit that a copy of the writ has been left at defendant's house, still the mere want of that averment in the affidavit is not sufficient to enable the defendant to move to set aside the *distringas* as being irregular.

BUSBY moved to set aside a writ of *distringas* which had been issued by order of Mr. Baron *Vaughan*. The objection was, that the affidavit on which the order was obtained omitted to state that a copy of the writ of summons was left at the defendant's house. He grounded his motion upon an affidavit of the defendant and his daughter, which stated that the defendant was always at home, and that there had been no service. It has been held by the full Court that a copy must be left.

Per Curiam.—The Court would perhaps require a copy to have been left, if their attention had been called to it: but the affidavit and *distringas* are not necessarily irregular for want of the averment of a copy having been left. It is discretionary in the Judge; and we think that is no ground for setting aside the *distringas*. Your affidavit ought at least to have negatived a great deal more than it has done; and, you can get out of the difficulty, and have your goods back, by entering an appearance.

1833.

BAKER v. RYE.

IN this case an order had been made by Mr. Baron *Vaughan*, for amending the issue, &c., at the instance of the defendant. The order, with the *allocatur* thereon, was as follows:—

An attachment will not lie for disobedience to a Judge's order until it is made a rule of Court, though the order has been acquiesced in, and acted upon.

“ Allowed for costs, 1*l.* 19*s.* T. Dax.

Baker } Upon hearing the attornies or agents on both sides,
v. }
Rye. } I order that the defendant be at liberty to amend the issue and plea of set-off, upon payment of costs by defendant's attornies.”

The amendment having been made, and the costs not paid, *Comyn* had moved for and obtained an attachment against Messrs. *Answorth & Marner*, the defendant's attornies, for not paying the costs pursuant to the Master's *allocatur*. The affidavit stated the service of a true copy of the order and Master's *allocatur* thereon, by delivering the same personally to Mr. *M.*, and at the same time shewing him the original order and *allocatur*; and, that deponent then demanded of him the costs allowed by the Master on the said order, and gave notice of motion for attachment. It then stated a similar service, &c., on the other attorney. The office copies of the order of Mr. Baron *Vaughan*, and of the rule for attachment, were annexed.

Platt, on a former day, had obtained a rule *nisi* to set aside the attachment.

Comyn now shewed cause.—The payment of costs by the defendant's attornies was the condition on which the amendment was allowed, and they have not been paid.

1833.

BAKER
v.
RYE.

The Court here directed his attention to the question whether an attachment would lie for not obeying a Judge's order?

Platt.—The order was never made a rule of Court.

Per Curiam.—The rule must be absolute for setting aside the attachment. But we think it reasonable that the costs of the amendment should be set off against the costs of this rule.

Rule absolute.

ALIVEN v. FURNIVAL.

Where *nil debet* and several special pleas were pleaded to debt on a foreign judgment, *nil debet* was ordered to be struck out.

THIS was an action of debt on a *French* judgment. The original action was for not erecting certain machinery. The defendant pleaded *nil debet*, and several special pleas, stating in substance, that, after the judgment had been obtained in the *French* Court, the defendant was taken in execution in *France*, and remained in custody there for four months.

Manning on a former day obtained a rule *nisi* to strike out the general issue or the special pleas, stating, that they were ready to admit the facts stated in the defendant's pleas, and to reply an escape, by which the real question in dispute would be raised on the record; and, that there would be considerable difficulty and expense in proving the *French* laws, and the proceedings in the *French* Court. Their pleas do not state that a judgment in *France*, and a taking in execution upon it, are a discharge. The general issue would let the defendant in to take the defence he has pleaded. [*Bayley*, B.—That of itself is no objection. This is an issuable plea beyond all doubt, as it goes to the

merits. You may give infancy in evidence under the general issue, and yet you may plead it. The plaintiff may admit the infancy, and take issue on something else.] Infancy is a good plea; but, here the plea raises the question, whether imprisonment for four months on a foreign judgment is a good plea.

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ALIVEN
v.
FURNIVAL.

Carrington shewed cause.

BAYLEY, B.—The object of special pleas is to narrow the point in dispute; but, if you put it at large, as well as narrow, no good is done. We think the judgment ought to be admitted, and *nil debet* to be struck out; and they may take issue on your pleas by replying, that, by the law of *France*, it is no satisfaction to take a man in execution, if he afterwards escapes.

The other Judges concurred.

Rule absolute, for striking out *nil debet*.

BURT v. OWEN.

WIGHTMAN, in last *Michaelmas* Term, had obtained a rule *nisi* for referring a bill of costs to the Master to be taxed.

An affidavit more than a year old, cannot be used on moving for a rule.

J. Jervis shewed cause, and objected, that the affidavit on which the rule was obtained was sworn so long ago as *December*, 1831. [Lord *Lyndhurst*, C. B.—No rule can be made on such a stale affidavit.] There is another objection: it is sworn before the party's own attorney.

Wightman.—The affidavit having been sworn before the

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v.
OWEN.

late rule (a), the last objection cannot prevail. [*Bayley, B.*—It was a good objection in this Court, even before the late rule; and the officers state, that the objection applied also where it was sworn before the partner of the attorney (b).] That affidavit was filed, and it was not necessary to have another. It was used on a summons before *Vaughan, B.*, in *December, 1831*, and again in *November, 1832*, before the rule was moved for, and no objection was then made to it on account of its antiquity. [He then went into the merits, but the Court were against him on that point.]

Lord LYNDHURST, C. B.—The staleness of the affidavit is alone a sufficient objection; but, on account of your double delinquency, the rule must be discharged with costs.

Rule discharged, with costs.

(a) Reg. Gen. H. T. 2 Will. 4, r. 6, *ante*, p. 184.

(b) See 1 Price, 116.

DOE d. COCKBURN v. ROE.

Where the tenant was ill, service on the daughter, who read and explained the declaration to her father, was held sufficient.

J. JERVIS moved for judgment against the casual ejector. The affidavit stated, that the declaration was delivered to a daughter of the tenant in possession, and explained to her. That she said her father was ill up stairs, and that she would go up and see him. That she went up stairs, and came down again, and said, she had told him and explained it to him. The affidavit did not state that deponent believed it to be true.

Per Curiam.—We think this is a sufficient service on the father under the particular circumstances.

Rule absolute.

1833.

DOE *d.* WINGFIELD *v.* ROE.

WHITMORE moved for judgment against the casual ejector. The premises were at *Streatham*, and appeared to be uninhabited. The service was stated to be on the wife, at the husband's residence, at *Wandsworth*.

Service of declaration in ejectment on the wife at the husband's residence is sufficient, though the husband does not reside on the premises.

Per Curiam.—That is sufficient.

Rule granted.

W. R. White v. Garsington P. St. L. 1833.

POOLE *v.* PEMBREY and Wife.

TOMLINSON, on a former day, had obtained a rule *nisi* for setting aside a plea in abatement of non-joinder of another person liable, with costs, and for signing judgment. The declaration was in *indebitatus assumpsit*. The objections were to the affidavit of truth.

An affidavit in support of a plea in abatement must strictly agree with the plea, and a variance in the christian name entitles the plaintiff to sign judgment.

Addison now shewed cause.—The first objection is that the addition of the deponent is not stated, in pursuance of the late rule (a). The affidavit is “*Edward Pembrey*, one of the defendants, maketh oath, and saith, that the plea hereto annexed is true in substance and fact.” He contended that the rule was not intended to apply to such an affidavit. [*Bayley*, B.—It is made by one of the defendants in the cause (b).]—Another objection is, that the title

It is no objection to such an affidavit, that the addition of the defendant is not stated, though the rule 5 H. T. 2 Will. 4, is general.

Semle.—Upon setting aside a plea in abatement for irregularity, no costs are allowed.

(a) Reg. Gen. H. T. 2 Will. 4, tit. “Affidavit,” rule 5. “The addition of every person making an affidavit shall be inserted therein.”

(b) It was the usual practice, before the late rule, to give the addition of a defendant swearing to the truth of a plea in abatement.

See the forms, 3 Chitty on Pleading, (4th ed.) 897, 902, and Tidd's Forms, tit. “Plea in abatement.” The rule of H. T. 2 Will. 4, is not in fact a new rule, but a new application of the old rule of the *King's Bench*, M. T. 15 Car. 2, to the other Courts: and the words of both rules are as general as pos-

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of the plea is the 14th of *January*, and the affidavit purports to be sworn at *Chester*, on the 12th. The declaration was on the 10th. [*Bayley, B.*—The affidavit might have been annexed to the plea when it was sworn.] Allowance must be made for the time occupied in sending the plea to town (*a*). The last objection is, that in the declaration the parties are described as "*Edward Pembrey and Ann Mary his wife.*" In the title of the affidavit, the parties are "*Edward Pembrey and Mary Ann his wife.*" He contended, that, though the names were transposed, the parties were sufficiently identified. She is stated to be his wife, *non constat* but that her right name is *Mary Ann*, as in the affidavit: and if it is objected, that there is no averment to shew that they are the same, that certainly would be an objection to the plea; but they cannot take advantage now of objections appearing on the face of the plea, which would have been good grounds of demurrer.

Per Curiam.—The objection is, that your affidavit does not agree with the plea. We think it wrongly intitled. It must be in such a form as that perjury can be assigned on it. The rule must be absolute.

Tomlinson applied for costs, contending, that if judg-

sible—"every person making an affidavit." In *Anon.* 6 Taunt. 73, it was held in the *Common Pleas*, that an affidavit in support of a motion made in the course of a cause, which stated the abode of the defendant, and styled him defendant, was sufficient, though it did not contain the addition of his degree; and the Court there observed, that there was no rule in that Court, as there was in the *King's Bench*, specially requiring the addition of deponents; and they held, that an affidavit made by a defendant in the

cause was sufficient, if it stated his place of abode and referred to his quality of defendant." The cases upon the subject of additions in affidavits, are, *Jarrett v. Dillon*, 1 East, 13; *D'Argent v. Vivant*, Id. 330; *Huslope v. Thorne*, 1 M. & S. 103; *Smith v. Younger*, 3 Bos. & P. 550; *Vaissier v. Alderson*, 3 M. & S. 165. It has since been decided that this is a good objection.

(*a*) See, on this point, *Lang v. Comber*, 4 East, 348; and *Basket v. Barnard*, 4 M. & S. 331, *acc.*

ment had been signed at once, they could not have moved to set it aside except on payment of costs, and that the rule was moved with costs.

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But, *per Curiam*.—Neither party has costs on a plea in abatement: and you are not entitled to ask for them, on setting aside such a plea for irregularity.

Rule absolute, unless defendant pleads issuable on the usual terms, within ten days, or pays debt and costs within that time (a).

(a) In *Prince v. Nicholson*, 4 Taunt. 333, it was held, that an affidavit verifying a plea *puis darrein continuance* was sufficient, though it was not intitled in the cause. The Court there said, "that it was generally required, and was a proper rule, that the affidavit shall be intitled in the cause, that it might be sufficiently certain in what cause it is, to admit of an indictment for perjury; but this affidavit refers to the annexed plea, and the annexed plea is in the cause, and *verba relata videntur inesse*: therefore, it amounts to the same thing, as if the affidavits were intitled, and the plaintiff could prosecute for perjury on this affidavit." But in *Richards v. Setree*, 3 Price, 301, where there was a variance between the title of the affidavit and the title of the

cause, *Thompson, C. B.*, said "Certainly, wherever an affidavit is made in a suit that has been commenced, it ought to be intitled, and as of the precise cause in which it is to be used. A case has been cited, where it is said the Court of *Common Pleas* received an affidavit without title, because the Court thought that, by reference from the body of it, the title of the cause might be supplied by the one prefixed to the annexed plea. But, even supposing that to have been rightly decided, it does not apply to the present case; for here a specific title is given to the affidavit, and that turns out to be not the title of this cause. In assigning perjury it must be shewn, that there was such a cause pending as that from which the affidavit takes title."

1833.

SPIVY v. WEBSTER.

Though a party is at one time in contempt for not paying costs which have been duly demanded, yet, if before an attachment is moved for, the sum due becomes reduced in amount, a fresh demand of the reduced sum must be made to ground a motion for an attachment.

HOGGINS, moved for an attachment against the plaintiff, for not paying certain costs, pursuant to the Master's allocatur. A similar motion was made last term; but, in consequence of some informality, that rule had been discharged with costs. Mr. Baron *Vaughan* had since made an order, that the costs of that rule, amounting to 11*l.* 17*s.*, should be deducted from the sum of 44*l.* 10*s.* claimed by the defendant. The sum of 44*l.* 10*s.* had been duly demanded, before the former motion for an attachment had been made: no demand had been since made of the costs, *minus* the 11*l.* 17*s.* ordered to be deducted.

The Court held, that such demand was necessary, and refused the rule.

Rule refused.

HALL v. FORGET.

Where the plaintiff failed in recovering the sum for which he arrested the defendant, the Court allowed the defendant his costs under the 43 *Geo.* 3, c. 46, though the account was very long and had been running for several years; it appearing that there must have been either gross neglect or wilful overcharges in making out the account. This act is rather to be extended than confined in its operation.

THIS was a rule, calling upon the plaintiff to shew cause why the defendant should not be allowed his costs, under the 43 *Geo.* 3, c. 46, s. 3. The arrest was for 68*l.* and the arbitrator, to whom the action was referred, awarded that the sum of 23*l.* only was due. The plaintiff was a broker, and had been employed by the defendant, and there was a long account between them, which had been running from 1829 to 1832, and amounting to upwards of 900*l.*; the sum claimed was the balance alleged to be due: the defendant had been applied to several times for it, and said he would send, and on one occasion offered to give two bills for the balance claimed, amounting to 68*l.* and upwards, including interest. The whole account was investigated before the arbitrator, and forty or fifty of the items were found to be wrong: some few of the items

charged less than was actually due, amounting together to 3*l.* or 4*l.*: the other mistakes in the account were overcharges to the amount of 9*l.* 8*s.*, and too high a charge for commission was also made.

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v.
FORGET.

Law and Richards shewed cause.—They contended that this was not a case contemplated by the act; and though it might be a salutary construction, to apply the act to a case like the present, that was not the construction which the act had heretofore received. The account was of great length; the sum claimed was cut down by an examination of the whole account, and the sums disallowed bore but a small proportion to the whole amount: and here the defendant had actually promised to pay, and even offered to give bills. [*Bayley, B.*—At that time he did not know of the overcharges.] The overcharges arose from a mistake of the clerk, in making out the account. [*Bayley, B.*—The plaintiff has either been guilty of gross neglect or wilful misrepresentation.] The plaintiff has sworn that he believed the whole sum to be really due. There is nothing to shew wilful misrepresentation on his part. There must be such evidence in support of this motion, as would establish an action for a malicious arrest: in more than one case it has been held so by the Court; the act substituted a summary remedy for the action for a malicious arrest. They cited a case of *Stovin v. Taylor* (a). It would be too much to say, that there is here

(a) Not reported. The learned counsel has obliged us with the following note of the case, K. B., Hil. T., 3 *Will.* 4.

STOVIN v. TAYLOR.

BUTT moved for a rule calling on plaintiff to shew cause why the Master should not tax the defendant her costs under the 43 *Geo.* 3, c. 46, the plaintiff not having recovered the amount for which he held the defendant to bail. The motion was founded on an affidavit, stating that the defendant was held to bail for 28*l.*; that the declaration

Where there is a reasonable doubt in law as to the right of the plaintiff to recover part of his demand:—*Held*, that de-

fendant was not entitled to claim the benefit of the 43 *Geo.* 3, c. 46.

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 {
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a want of all reasonable or probable cause. It would be impossible for a plaintiff bringing an action for a balance, to arrest the defendant, if, upon a scrupulous examination of a long account, the plaintiff, not being able to substantiate his claim to the whole, should be liable to lose his costs.

Williams, contra.—Malice is not made necessary by the act. The object of the act was to protect defendants from the inconvenience of putting in bail for claims to which the plaintiff is not entitled.—He was then stopped by the Court.

BAYLEY, B.—The rule ought to be made absolute; no

was on a bill of exchange, (drawer against acceptor), for 12*l.* 12*s.* and the common counts. The particulars of demand contained an item for the amount of the bill; and 15*l.* 2*s.*, the costs to which the plaintiff had been put by reason of his being sued as drawer of the same bill. At the trial at *London*, before the Lord Chief Justice, the plaintiff recovered a verdict for 12*l.* 12*s.* only, the counsel for the plaintiff admitting that he could not recover the residue. *Dawson v. Morgan*, 9 B. & C. 618, was cited.

PATTERSON, J.—That was the case of indorsee against acceptor, between whom there is no privity.

Butt.—Upon principle, there is no distinction between that case and the present. The only privity between the drawer and acceptor is on the bill: and, upon the dishonour of the bill, the drawer is bound to pay; if, then, he neglects to do this, and suffers himself to be sued, he cannot recover the costs against the acceptor. Here, indeed, the plaintiff has merely declared on the bill; and if there were any pretence for the action, the plaintiff should have raised the point by declaring specially.

Per Curiam.—It is not so clear, that a drawer cannot recover such costs against an acceptor; it is perhaps reasonable that he should: and we think that this is not an instance (there being reasonable doubts on the question,) where the defendant should be allowed his costs.

Rule refused.

objection is said to have been made; but if, at the time of offering the bills, the defendant had known that false charges had been made, it would have been waste of time to say he approved of the account: but he did not discover the objections till afterwards. Here he was liable for 25*l.*, and was arrested for 68*l.*, and 9*l.* are shewn to have been charged for disbursements, which were never made. In almost every item there is some mistake: on the credit side two or three, and on the debit side ten or twelve. It was the duty of the defendant to be accurate; he ought to have regularly entered in a book what he disbursed; the fault lies peculiarly within his own knowledge. Is it a case within the words of the act? The words are, "If the plaintiff shall not recover the amount for which the defendant shall have been arrested, such defendant shall be entitled to his costs." Then there is a proviso "that it shall be made appear to the Court by affidavit, that the plaintiff had not any reasonable or probable cause for arresting the defendant for that amount;" without that proviso a defendant would have had costs in every case. It has been contended, that this case does not come within the principle upon which the Courts have acted; that the Courts have looked to see whether the arrest was malicious; but the cases have gone on the reasonable or probable cause. There is a case *Feely v. Reed* (a), where executors were held liable; and also *Glenville v. Hutchins* (b); and the very point was determined in *Donlan v. Brett* (c), where it was held, that, to entitle a defendant to avail himself of this act, it is not necessary he should shew malice; but it is sufficient for him to make out that there was a want of reasonable or probable cause for the arrest. To entitle a defendant to costs, it is not necessary that the arrest should be malicious; all that is necessary is a want of reasonable or probable cause. As to the 9*l.* 8*s.*,

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(a) 5 B. & A. 515, note (a). (b) 1 B. & C. 91. (c) 10 B. & C. 117.

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there is absolutely none. The ground of arrest is, that the plaintiff has paid those sums; he has not done so. It is said, that is a small item: but there is a sum of 33*l.* more; the plaintiff could not suppose he had a reasonable ground for the whole sum. The act of parliament is a very salutary one, and I am not disposed to relax it. In the early decisions upon the act, it was held that malice was necessary; but that is now exploded; all these cases rest on their own peculiar circumstances. I was at first struck with the observation that the account was long; but the plaintiff ought to have known that he had no right at all to a great part of it.

GURNEY, B.—The way in which the account is made out, shews that the defendant did not keep correct accounts, and trusted to his employers not discovering the mistake. A practice has grown up among brokers of charging sums not actually paid. The act is intitled “an act to prevent frivolous and vexatious arrests.” We must look to the act, to see what those vexatious arrests are; and they are described to be cases, where there is no reasonable or probable cause for the arrest; this is a case of that description. The rest of the Court concurred.

Rule absolute.

STACEY *v.* FIELDSEND.

A prisoner, who has been in custody for twelve months for a debt or for damages not exceeding 20*l.*, is entitled to his discharge absolutely as a matter of right.

HUMFREY had obtained a rule for discharging the defendant out of custody, he having been in prison twelve months for a debt under 20*l.*

Hoggins shewed cause.—The words of the act (*a*) are, “That all persons in execution upon any judgment, for any

(*a*) 48 Geo. 3, c. 123.

debt or damages not exceeding 20*l.*, exclusive of the costs recovered by such judgment, and who shall have lain in prison thereupon for the space of twelve successive calendar months next before his application to be discharged, shall, upon application for that purpose, in term time, made to his Majesty's superior Courts of record, *to the satisfaction of such Court*, be forthwith discharged out of custody as to such execution, by the rule or order of such Court." The affidavit stated that the defendant had three houses, and received the rent for them: and that the plaintiff had offered to discharge him, upon his giving security upon the property. He contended that the act enabled the Court to look into the circumstances of the cases, and that, if the Court were not satisfied, they might refuse to discharge him.

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Per Curiam.—We have no discretion. The words "satisfaction of the Court" refer to the fact of his imprisonment for twelve months, &c.

Rule absolute.

MARRYOTT *v.* CLAPP.

BEARE had obtained a rule to shew cause why the Master should not review his taxation, and why the plaintiff should not pay all costs since an offer made by the defendant to pay the sum of 9*l.* 2*s.* 6*d.*, and why the defendant's costs since that time should not be set off against the plaintiff's costs. The circumstances were these: the writ sued out by the plaintiff was indorsed to pay 11*l.* 10*s.* 1*d.*; the particulars of demand claimed only 9*l.* 2*s.* 6*d.*, but that was alleged to have been by mistake, as the larger sum was due. A plea of misnomer having been pleaded, the plaintiff took out a summons to amend the declaration and particulars; and an order for that purpose was

If a defendant offers to pay part of a debt which the plaintiff refuses to accept, and the defendant then pays the money into Court, and the plaintiff takes it out, the defendant is entitled to costs from the time of the offer.

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 STACEY
 v.
 FIELDSEND.

made on *November 24th*. On the 28th, the costs of the amendment were taxed. On the 29th, a summons was taken out by the defendant, for staying proceedings on payment of 9*l.* 2*s.* 6*d.*, which was attended before *Bayley*, B., who recommended the plaintiff to accept 8*l.*, and the defendant to forego the costs of the amendment: the defendant having refused to pay the 8*l.*, both parties determined to stand on their rights, and the plaintiff, on *December 18th*, paid the costs of the amendment. On *December 20th*, another summons was taken out by the defendant, for setting aside the proceedings for irregularity, which was attended before *Bolland*, B., and dismissed for irregularity; and then defendant tendered 9*l.* 2*s.* 6*d.* which the plaintiff again refused to accept: the defendant then pleaded, and paid 9*l.* 2*s.* 6*d.* into Court, which the plaintiff afterwards accepted. The Master taxed the costs at 8*l.* 2*s.*, without allowing the defendant any costs. It was contended for the defendant, that he ought to have been allowed his costs from the time of the first offer, or at all events from the time of the second offer, on *December 20th*; and *James v. Raggett* (a) was cited.

Erle, contra, contended that the defendant had, by his conduct, precluded himself from his right to costs.

Per Curiam.—It is a general rule, that if a party offers what you afterwards take, without getting more, you must pay costs up to that time; the defendant is entitled to his costs from the 20th *December*. The case cited does not apply.

Rule absolute: no costs on either side.

(a) 2 B. & Ald. 776.

1833.

MAHONEY v. FRASER.

IN trespass for breaking and entering the plaintiff's house and turning him out of possession, the jury gave 1000*l.* damages; which was, in fact, the full value of the plaintiff's interest in the house. Upon a motion for a new trial, on several grounds, the Court expressing an opinion that there must be a new trial on the ground of excessive damages—

Where a party is entitled to move for a new trial as a matter of right, the Court cannot limit the inquiry to one particular point, but must grant it generally.

Hutchinson, for the plaintiff, contended that the new trial ought to be confined to that point; but—

Per Curiam.—We cannot do that. Where it is matter of right to have a new trial, the Court cannot confine or limit the inquiry; where it is a matter of indulgence only, they may.

Rule absolute, generally (a).

(a) Same case 1 Cr. & M. 325.

— *La. Annon. v. de la Chapelle 2. H. L. 24.*

WILLIAMS v. SMITH and Another.

ARCHBOLD applied for a *habeas corpus ad respondendum*, to bring up a defendant, who was in the custody of the Marshal in this action, and also in another action in the *King's Bench*, and in criminal custody under a Judge's warrant. This action was against two defendants, one of whom had been served, and the other arrested on a *ca-pias*. [*Bayley B.*, suggested that, under the new process act, he might have a writ of detainer against him.] Our object is to charge *Smith* with a declaration; we do not want to change the custody; the other, whom we have served, we cannot serve again: and if we charge this one with

Where one of two defendants was in custody on a criminal charge, the Court allowed him to be brought up, to be charged with a declaration.

1833.
 MAHONEY
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a declaration, we can declare against the other who has not appeared.

BAYLEY, B.—You may take your rule.

Rule granted

ROGERS v. JONES.

If the affidavit of justification states that the bail are "possessed" of a certain sum, instead of "worth," the affidavit is insufficient and must be amended.

CHANNEL objected to the affidavit of justification, that the word "possessed" was used instead of "worth," and he referred to a case of *Simpson's* bail (a), in this Court, in which that was held to be a good objection.

John Jervis, contra, said this was country bail, and the affidavit followed the form given by the new rules of T. T. 1 *Will.* 4, r. 3 (b), in which the word *possessed* is used. He submitted, that, having followed the form, that was sufficient, or, if the plaintiff was not satisfied, time should be given without payment of costs.

Channel referred to the late rule of 1 H. T. 2 *Will.* 4, r. 19 (c), which is general, applying as well to country as to other bail; and expressly says, that affidavits shall be deemed insufficient, unless each bail swears he is *worth* the amount required over and above his just debts.

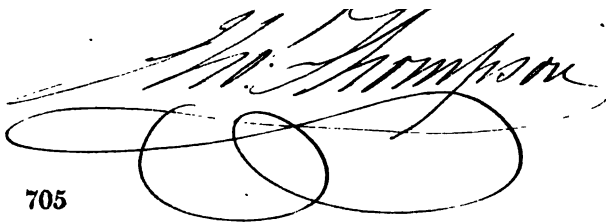
The Court seemed at first inclined to the opinion, that, taking the two rules together, the word *possessed* was equal to the word *worth*: but upon examination of the rules and the form of affidavit, they held that the defendant had not complied with the rules, either in substance or form. Time was however given.

The costs to be costs in the cause.

(a) *Ante*, p. 605.

(b) *Ante*, p. 103.

(c) *Ante*, p. 189.



COURT OF COMMON PLEAS.

Michaelmas Term,

IN THE THIRD YEAR OF THE REIGN OF WILLIAM IV.

SHAW *v.* ARDEN and Another, Gents. &c.

1832.

THIS was an action to recover the sum of 19*l.* 8*s.* 11*d.* The defendants, who were attornies, pleaded a set-off of 21*l.* 13*s.* 6*d.* for business done for the plaintiff in the Palace Court, and also paid the sum of 3*l.* 10*s.* into Court. The facts were these—The defendants were employed by the plaintiff to sue in the Palace Court a person named *Cooper* and his son, upon a joint and several promissory note. Two actions were commenced upon it. When the causes were so far advanced as to entitle the plaintiff to sign judgment, terms of compromise were offered by the elder defendant. Proceedings were accordingly stayed upon certain conditions. The plaintiff afterwards wrote to his attornies desiring them to proceed in the actions, as *Cooper* had not fulfilled his promise. Judgment was accordingly signed and execution issued against the *Coopers*; who obtained a rule to set aside the judgment, on the ground of its having been signed against good faith. Cause was shewn against the rule, but it was made absolute, with costs. The costs paid by the defendants to *Coopers'* attorney, the plaintiff's costs in shewing cause, and the costs of signing judgment, formed the defendants' set-off to the present action. *Tindal*, C. J., who tried the cause, directed the attention of the jury to the question of whether the defendants

The jury have a right, in considering an attorney's bill, to reject any item which is altogether useless; but have not a right to reject an item, a part of which may be useless.

1832.

SHAW
v.
ARDEN.

had exercised a proper discretion, with a view to the interest of their client, in signing and endeavouring to support the judgment; or whether they had taken those proceedings unnecessarily and improperly. The jury found for the plaintiff, damages 16*l*.

Adams, Serjt., moved to set aside that verdict, on the ground that the learned Judge had misdirected the jury, and improperly admitted evidence as to the utility of the proceedings in the Palace Court. He cited *Templer v. M'Lachlan* (a), and *Hall v. Featherstonehaugh* (b).

Per Curiam.—The question is, whether evidence was improperly admitted, or the cause improperly left to the jury. The validity of the claim of set-off having been denied by the plaintiff, we must consider the case, with regard to the defendants, as if they were now suing on a bill for business done. As to the first point, we are of opinion that evidence was properly admitted to shew the utility or inutility of the different items in the defendants' set-off, as it was competent for the jury to discriminate between those different items. If an entire item were for work partly useful, the jury could not reduce that item in an action to recover the amount of the bill, but resort must be had to a cross action. Entire items for useless work may be rejected by the jury. That was decided in *Hall v. Featherstonehaugh*, which is an authority for dividing an attorney's bill. Then, as to the second point, it is clear, that a party cannot enforce a charge for business which is useless to his employer. That this work was useless to the plaintiff is shewn by the result. However, the result would not be conclusive to shew that it was improperly undertaken. That was a question for the jury, and on which there was conflicting evidence. There was therefore nothing impro-

(a) 2 N. R. 136.

(b) 5 M. & P. 541; S. C. 7 Bing. 569.

per in leaving it for the jury to consider, whether the defendants in signing judgment had acted with the discretion due to the plaintiff's interest.

Rule refused.

1832.

SHAW
v.
ARDEN.

ORCHARD v. GLOVER.

ON shewing cause against a rule for changing the defendant's bail, it appeared that the reason for not putting in good bail at first was, that he anticipated the action would be settled.

An expectation that a cause would be settled, is not sufficient to entitle a defendant to change his bail.

TINDAL, C. J.—The rule of T. T. 1 *Will.* 4 (a) would be of no use, unless the party seeking to change bail shewed to the Court an adequate reason for not putting in good bail at first. No adequate reason has here been assigned, and therefore the bail cannot be changed.

Rule discharged.

(a) *Ante*, p. 103.

WICKHAM, Demandant, FOREMAN and Wife, Deforciant.

WILDE, Serjt., moved that this fine might pass, although the affidavit of acknowledgment was on paper, instead of parchment. The conusors resided at *Leghorn*, and the præcipe and concord were sent along with the affidavit, engrossed on parchment. All the documents were returned, with the exception of the affidavit; instead of that, and of the certificate of swearing, authenticated co-

Where a fine may be allowed to pass without an affidavit on parchment.

1832.

WICKHAM,
Demandant,
FOREMAN,
Deforciant.

pies were sent, engrossed on *Tuscan* stamped paper, annexed to the præcipe and concord. From those copies, it appeared that the affidavits had been sworn before a competent authority, and the certificate duly made and authenticated. The original affidavit was deposited in the tribunal, according to the laws of *Tuscany*. The copies were attested by the auditor of the Court, and signed by a notary public, and a translation by the translator of the tribunal was attested by the consul.

Passed.

SYLVESTER and Another v. WEBSTER and Another.

An attorney's bill for business done at Quarter Sessions must be delivered, pursuant to 2 Geo. 2, c. 23, a month before action brought.

THIS was an action on an attorney's bill. Among the items were charges for attending at the *Clerkenwell* Sessions-house, to ascertain whether a bill of indictment had been found against a person, for whose appearance at the Sessions the defendants were bail; for attending at the office of the clerk of the peace, when the Sessions had ended, to obtain the discharge of the defendants' recognizances, and paying a fee to the clerk of the peace for that discharge. No other items for business done in Court were contained in the bill. No bill was delivered by the plaintiffs a month before action brought. The plaintiffs had a verdict, and leave was given to the defendants to move to enter a nonsuit, on the ground that the bill was taxable under the 2 Geo. 2, c. 23, s. 23, and consequently, that the plaintiffs should have delivered their bill a month before they brought their action. A rule *nisi* for that purpose having been obtained—

Wilde and *Andrews*, Serjts., shewed cause.—They contended, that the Court of Quarter Sessions was not one of the Courts to which the 2 Geo. 2, c. 23, was intended to

apply; and that, if it was such a Court, the business here charged in the bill was not performed by them in their character of attornies in Court. They cited *Stephenson v. Taylor* (a), *Fenton v. Correa* (b), *Williams v. Odell* (c), *Burton v. Chatterton* (d), *Wilson v. Gutteridge* (e), *Smith v. Wattleworth* (f), *Collins v. Nicholson* (g), *Sandon v. Bourn* (h).

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Taddy, Serjt., in support of the rule, cited *Clarke v. Donovan* (i), *Ex parte Williams* (j), *Smith v. Taylor* (k).

Cur. adv. vult.

TINDAL, C. J. (having stated the facts of the case)—The charge for attending at the office of the clerk of the peace after the Sessions were over, to get the recognizances discharged, and which were discharged on paying a certain fee to the clerk of the peace, appears to us a charge for business done at the Quarter Sessions. The discharge of the recognizances must be considered as the act of the Court, which alone has power to give such a discharge, although it is given over to the party who has entered into the recognizance, by the clerk of the peace, after the Sessions have ended. The only question then to be considered, is, whether business done at the Quarter Sessions comes within the meaning of the act. That it does, has been held in two cases: first, in *Ex parte Williams*, where the Court, after making inquiries, reversed their former decision; and, secondly, in *Clarke v. Donovan*, where the Court of *King's Bench* recognised the latter decision, and

(a) In a note to *Ex parte Williams*, 4 T. R. 142.

(b) Ry. & Mo. 262.

(c) 4 Price, 279.

(d) 3 B. & Ald. 486.

(e) 3 B. & C. 157; 4 D. & R. 736.

(f) 4 B. & C. 364; 6 D. & R. 510.

(g) 2 Taunt. 321.

(h) 4 Camp. 68.

(i) 5 T. R. 694.

(j) 4 T. R. 496.

(k) 5 M. & P. 66; S. C. 7 Bing.

262.

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observed, "there was no reason for restraining the general words of the first part of the clause, which requires an attorney to deliver his bill one month before he commences any action for the recovery of the amount." These decisions have been acted upon for a long period, and therefore ought not to be overturned, unless the Court can clearly see that the construction put on the act in those two cases is wrong. We cannot arrive at any such conclusion. It may, in addition, be remarked, that, by the subsequent statute of the 22 Geo. 2, c. 46, s. 12, "no person whatsoever shall act as attorney, at any general or Quarter Sessions of the peace, for any county &c., within the kingdom, either with respect to matters of a criminal or civil nature, unless such person shall have been admitted an attorney of one of His Majesty's Courts of Record at *Westminster*, and duly enrolled, pursuant to the act 2 Geo. 2." If we construe these statutes as made *in pari materia*, there appears no reason why an action brought by the same person to recover fees for business done in the Court of Quarter Sessions should not be subject to the same law as an action "for fees, charges, and disbursements at law or in equity" is subjected to by the 2 Geo. 2. The rule for entering a nonsuit must therefore be made absolute.

Rule absolute.

NEWARK, Vouchee.

If a recovery be suffered by the son of a peer, the Court will allow it to pass, although the acknowledgment is signed with his name of courtesy only, if he be described on the record as "commonly called Lord" &c.

BOMPAS, Serjt., moved that the recovery in this case might pass. The vouchee was the son of a peer, but was described in the *dedimus* and acknowledgment as "Charles Henry Pierrepont, commonly called Lord Viscount Newark;" and he had signed the acknowledgment "*Newark*"

In the case of *Tatton*, demandant, *Grey*, vouchee (a), the Court would not allow a recovery to pass, because the acknowledgment had been signed by the son of a peer with his name of courtesy, and not with his true name. But that case was distinguishable from the present, because the record described the vouchee as "commonly called Lord Newark."

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NEWARK,
Vouchee.

Cur. adv. vult.

TINDAL, C. J.—The Court has examined the record in *Tatton*, demandant, *Grey*, vouchee, and it appears that none of the documents in that case described *George Harry Grey* as "commonly called Lord Grey." As this case therefore may be distinguished from that, the recovery may pass.

Passed.

(a) 9 B. Moore, 580; S. C. 2 Bing. 313.

MANESTY v. STEVENS.

JONES, Serjt., shewed cause against a rule for entering an *exoneretur* on the bail piece, on the ground that the process and affidavit of debt were general, and the declaration, particular. The plaintiff had, in her general character, arrested the defendant, and declared against him in her character of executrix. He contended, that, although where the process was particular, and the declaration general, the proceedings were bad, yet, where the process was general, and the declaration particular, no objection could be raised. He cited *Lloyd v. Williams* (a), *Weavers' Company v. Forrest* (b), *Watson v. Pilling* (c), *Rogers v. Jenkins* (d), *Douglas v. Islam* (e), *Canning v. Davis* (f),

If a plaintiff declares as executor on general process, the bail are discharged.

(a) 3 Wils. 141; 2 W. Bl. 722.

(b) 2 Str. 1232.

(c) 3 B. & B. 4.

(d) 1 B. & P. 383.

(e) 8 T. R. 416.

(f) 4 Burr. 2417.

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Ashworth v. Ryal (a). In that case it was expressly decided, that such a variance does not discharge the bail.

Wilde, Serjt., *contrà*, cited *Hally v. Tipping* (b), where the Court held, that the plaintiff should lose his bail, because he had declared differently from his writ. He also cited *Turing v. Jones* (c), where the latter case was recognised. In the case of *Marzetti v. Comte Du Jouffroy* (d), Lord *Tenterden* observed, "With regard to the objection, that the affidavit shews a cause of action in the representative character, and the process does not describe the plaintiff in that character, I think the case falls within the established rule, that the addition of the representative character is not necessary in the process. If, when the plaintiff declares, he should set out a cause of action different from that which appears in the affidavit of debt, the defendant, or his bail, can apply to the Court for relief."

Cur. adv. vult.

TINDAL, C. J.—The authorities on this point appear to be conflicting; but we are of opinion, that the present rule ought to be made absolute. We think that the bail are entitled to have an *exoneretur* entered on the bail piece, where the plaintiff declares for a cause of action different from that stated in the process, as in the present instance, where the process is general, and the declaration particular in the plaintiff's character of executrix. The defendant could not avail himself of this variance; but we think that the bail can.

Rule absolute.

(a) 1 B. & Adol. 19.

(b) 3 Wils. 61.

(c) 5 T. R. 402.

(d) *Ante*, p. 41.

1832.

DIGBY v. ALEXANDER.

IN this case judgment of *respondeat ouster* was given upon a plea of peerage. The cause went to trial, and the plaintiff had a verdict. A *ca. sa.* was issued against the defendant; and a rule *nisi* for setting it aside, on the ground that the defendant was a *Scotch* peer, was afterwards obtained.

The defendant pleaded peerage, and judgment of *respondeat ouster* was given on that plea; a verdict afterwards passed for the plaintiff, and a *ca. sa.* issued against the defendant; the Court refused to set aside this writ on an affidavit of peerage.

Stephen, Serjt., shewed cause, and cited Lord *Banbury's* case (a), *Com. Dig. Dignity*, (F. 3.), Countess of *Rutland's* case (b), In the Matter of the Countess of *Huntingdon* (c), *Vin. Abr. Abatement* (F. b.), Lord *Lonsdale v. Littledale* (d), *Trustees of Taunton Market v. Kimberley* (e).

Taddy, Serjt., in support of the rule, cited *Trinder v. Shirley* (f), *Bac. Abr. (Execution)*, 3 Rep. 12, Lord *Savile's* case (g), *Register*, 287 b, *Fitz. N. B.* 247 C, 2 *Lutw.* 1604.

TINDAL, C. J.—It is not necessary to go into the early and abstruse authorities in order to decide the present question. If a party having privilege of Parliament is arrested, his remedy is by plea in abatement, or by application for a *supersedeas*. In this case, the defendant pleaded in abatement, not alleging definitively that he was a peer, but merely stating evidence, on which a jury might decide as to the fact. The plea was held insufficient, and judgment of *respondeat ouster* awarded. The cause was tried, and the plaintiff obtained a verdict. After a judgment, in which the defendant has been ordered to answer

(a) 2 Lord Raymond, 1247.

(b) 5 Rep. 26 b.

(c) 1 Ventr. 298.

(d) 2 H. Bl. 267, 299.

(e) 2 W. Bl. 1120.

(f) Dougl. 45.

(g) Cro. Car 205.

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v.
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over as a common person, he is estopped from applying to the summary jurisdiction of this Court on the ground of his privilege as a peer. The present rule must, therefore, be discharged.

GASELEE, J., BOSANQUET, J., and ALDERSON, J., concurred.

Rule discharged.

WALL v. LYON.

A plaintiff has a right to amend after plea on payment of costs, under the rule *M. 1654*, s. 17; but whether he *must* pay costs on amending is a matter of discretion with the Court.

THE plaintiff in this case had amended his declaration after pleading in abatement, under the rule of *Michaelmas*, 1654, s. 17, and the Judge's order for the amendment directed it to be made "without payment of costs." The language of the rule is, that, in such a case, "it will be amendable by rule of Court upon costs, and liberty to plead, with a new or further imparlance." A motion having been made by *Ludlow*, Serjt., to amend the Judge's order, by substituting the word "upon," for the word "without"—

Per Curiam.—The rule is general, and the language of it does not prevent the Court from exercising its discretion as to the terms on which the amendment may be made.

Rule refused.

1832.

VANSANDAU & TINDALE v. BROWNE.

VANSANDAU & BROWN v. BROWNE.

THESE were actions on attorney's bills. The plea in both actions was the general issue. The jury, by consent, found a verdict in the first action for the plaintiffs, damages 64*l.* 1*s.* 2*d.*; and in the second, for 73*l.* 2*s.* 4*d.*, subject to the following case:—

The first-named plaintiffs, at the time the debt for which the first action was brought was contracted, were attorneys in copartnership together, and were retained and employed by the defendant to defend an action, brought against him by *Carr, Dodgson, & Co.* That action was commenced in *April*, 1826; and, in *Michaelmas* Term of that year, final judgment was obtained thereon by *Carr, Dodgson, & Co.*, against the defendants. The amount of the first-named plaintiffs' bill for defending that action, and for a motion made for a new trial, was 87*l.* 10*s.* 10*d.* On the 9th *November*, 1826, the first-named plaintiffs were advised by counsel to apply for relief to a Court of Equity, in order to prevent execution issuing on the judgment; and the first-named plaintiffs continued to conduct such suit until *Easter* Term, 1828, at which time the same plaintiffs dissolved their co-partnership; and, at the time of the dissolution, the amount of their bill in respect of the proceedings in *Chancery* was 176*l.* 10*s.* 4*d.*, over and above the before-mentioned sum of 87*l.* 10*s.* 10*d.*; the particulars of which the same plaintiffs delivered in due time before these actions were brought. The *Chancery* suit still remains undetermined; but, on the 15th *May*, 1830, an order or decree was made by the Master of the Rolls, whereby he directed a case to be submitted for the opinion of this Court, and that case has not yet been argued. About the month of *April*, 1828, the defendant paid the first-named plaintiffs, on account of their bill, 200*l.*

A party cannot compel his attorney to proceed in a suit until it is ended; but the latter may, upon reasonable cause and notice, relinquish the conduct of the suit, and recover his costs incurred during the time of his employment.

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The second-named plaintiffs, *Vansandau* and *Brown*, entered into partnership as attorneys in *February*, 1829; and, from that period to the present, conducted the *Chancery* suit on behalf of the defendant, and with his knowledge and consent.

There were letters from the defendant, of *June*, 1827, *October*, 1827, and *January*, 1828, soliciting indulgence in respect of the plaintiffs' demands; and one of *March*, 1828, promising payment of the balance claimed in the first action in a few days. In *June*, 1828, *Vansandau* apprized the defendant that *Tindale* had quitted the firm, and, demanding payment of the balance still due, said he had no motive for exertion in the *Chancery* suit, *Browne v. Carr*, till it was paid. In *May*, 1830, *Vansandau*, complaining that the old balance was still unpaid, wrote to say he would make no further cash payments in the *Chancery* suit. In *August* and *September*, 1830, *Vansandau* threatened to arrest the defendant for the balance still unpaid, and called on him to pay the costs already incurred in the *Chancery* suit, if he did not choose to proceed with it. The money not having been paid, *Vansandau* apprized the plaintiff, in *October*, 1830, that he had commenced actions against him; and that, in the second action against him, which he had instituted in the name of *Vansandau* and *Brown*, he would seek to recover the full amount of business done after the determination of the partnership of *Vansandau* and *Tindale*, both as regarded what was due to himself individually, as also that which was due to the partnership of *Vansandau* and *Brown*. If the defendant did not assent to that, he, *Vansandau*, would bring a third action against him, in the name of himself individually.

The plaintiffs' bills were delivered to the defendant a month before the action. In the first action they were signed by *Vansandau* and *Tindale*, and in the second by *Vansandau* and *Brown*. None of the charges were sub-

sequent to *April*, 1830, and the present actions were commenced in *October* following.

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Taddy, Serjt., appeared for the plaintiffs.—It was contended on the other side, that an attorney could not sue for his costs, until the suit in which he was engaged was judicially determined. If such a principle were recognised, it would frequently deter professional men from assisting parties in the attainment of justice. He cited *Rowson v. Earle* (a), as an authority to shew that an attorney may refuse to proceed, if not supplied with money by his client to carry on the suit.

Jones, Serjt., appeared for the defendant, and contended, that the plaintiffs could not maintain an action for the recovery of their costs in the suit, until the suit was determined. *Com. Dig. Atty. (B.)* 910, *Mulloy v. Bacher* (b), *Drapers' Company v. Davis* (c), *Mordecai v. Solomon* (d), *Cresswell v. Byron* (e).

TINDAL, C. J.—The plaintiffs are entitled to recover the taxed costs sued for in these actions, with the exception of those which accrued between the dissolution of the first partnership, and the formation of the second. They cannot be recovered in either of these actions without the defendant's consent; for, without it, a third action must be brought for the sum due to *Vansandau* alone.

It is contended by the defendant, that an attorney is not entitled to sue for his costs until the business in which he has been retained is terminated. I should not be easily induced to assent to that proposition. If the employer were to become insolvent during the progress of a long and

(a) 1 M. & M. 538.

(d) Sayer, 172.

(b) 5 East, 316.

(e) 14 Ves. 271.

(c) 2 Atk. 295.

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difficult suit, it would be very hard upon the attorney if he could not withdraw from such an engagement. He cannot wantonly withdraw, and thus throw unexpected difficulties in the way of his client. But, the plaintiffs here have not wantonly withdrawn; from the month of *June*, 1828, to the present time, they have frequently applied to the defendant for payment, and informed him, that an action would be commenced.

In support of the proposition for which the defendant contends, there is a case in *Siderfin*. The language of that case is strong; but, as no facts are stated in the report, we cannot judge how far they might have justified the opinion expressed by the Court. It is probable, that, on the day of the assizes, the attorney in that case deserted his client, and thus gave him no opportunity of obtaining other professional assistance. If that were the fact, the case was properly decided. The report of the case of *Mordecai v. Solomon*, states no facts, and, therefore, the conduct of the attorney may have been similar to that which I have supposed in the former case. The proposition laid down by the Court in that case I readily accede to, namely, that where an attorney has commenced a suit on the credit of his client, he is not at liberty to withdraw from it suddenly, because his client does not supply him with money on every occasion he thinks proper to demand it. In the case in 14 *Vesey*, Lord *Eldon* is represented to have said, "The client may discharge his solicitor; but I do not know that a solicitor, whatever may be his reasons for declining to proceed, can claim a lien if he does not carry the business through to a hearing. If that could take place, there might be numerous claims of lien." His Lordship must here have referred to the attorney's right of lien, when he had ceased to conduct a cause; and I am far from saying, that, if he refuses to proceed, he can retain the papers; for he thus declines to proceed himself, and precludes his client from proceeding without him. Lord *Eldon* con-

tinues, " the Court of *Common Pleas*, when I was there, held, that an attorney, having quitted his client before trial, could not bring an action for his bill." Here, also, we are not informed what the facts of that case were, but we may infer that the attorney deserted his client suddenly, and left him unprepared to act for himself. But, in the case of *Rowson v. Earle*, Lord *Tenterden* held, that an attorney having given notice to his client, that he would not proceed with a cause in the Court of *Chancery*, without money was supplied to him, had a right to withdraw from it, and might recover his costs up to that time. There is no authority, therefore, in support of the defendant's proposition.

All the business charged for by the plaintiffs in this action ended in *April*, 1830; and no action was commenced till the month of *October* in that year. We cannot, therefore, say, that the plaintiffs were not justified in refusing to proceed any further.

GASELEE, J., BOSANQUET, J., and ALDERSON, J., concurred.

Judgment for the plaintiffs.

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Hilary Term,

IN THE THIRD YEAR OF THE REIGN OF WILLIAM IV.

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HAGUE v. LEVI.

In an affidavit of debt for a certain sum for money had and received and money lent, it is not necessary to distinguish how much is due on each account.

JONES, Serjt., applied for a rule *nisi* to discharge the defendant out of custody on entering a common appearance, on the ground of a defect in the affidavit of debt. It alleged, that the defendant was indebted to the plaintiff in the sum of 50*l.* for money had and received to the plaintiff's use, and for money lent by the plaintiff; and did not distinguish how much was due on one account, and how much on the other.

Per Curiam.—We think the affidavit sufficient.

Rule refused.

TAYLOR v. Lady GORDON.

Where an arbitration is under an order of *Nisi Prius*, the costs of it are not costs in the cause.

THE present action was brought by the plaintiff, who had been tenant to the defendant, to recover the value of certain buildings, fixtures, and tenant rights, to which he alleged he was entitled according to the custom of the country where the premises were situate; and also for other demands. The defendant pleaded a set-off, and paid 300*l.* into Court. At the trial, the jury found in a particular way as to the custom alleged; and, by an order of

Nisi Prius, the plaintiff had a verdict for 500*l.*, subject to the award of a barrister, who was empowered to direct for what sum the verdict should ultimately be entered, and decide upon various other matters in difference between the parties. It was also directed, that, if either party, by wilful delay or otherwise, prevented the arbitrator from proceeding, he should pay such costs as the Court should think reasonable. No other direction was given in the order as to costs. The arbitrator directed the defendant to pay a sum beyond that brought into Court, and that each party should pay his own costs of the arbitration, and that the expense of the award should be paid equally between them. The Prothonotary, upon taxation, without regard to the terms of the award, allowed the plaintiff his costs of the arbitration. A rule *nisi* for reviewing the taxation having been obtained,

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Taddy, Serjt., shewed cause, and contended, that, under an order of *Nisi Prius*, the arbitrator stood in the place of a jury, and discharged their functions. The costs of the reference, therefore, were costs in the cause. He cited *Tregoning v. Attenborough* (a), and *Mackintosh v. Blyth* (b).

Wilde, Serjt., distinguished those two cases from the present, as in the latter the referee made no formal award, but merely certified the amount for which the verdict should be entered; and, in the former, the reference was for the exclusive benefit of the defendant. Here, however, the arbitrator had to inquire into various matters not at issue in the cause. The costs, therefore, incurred in the course of such an inquiry could not be considered as costs in the cause.

Cur. adv. vult.

(a) *Ante*, p. 225; 7 Bing. 733; S. C. 5 M. & P. 453.

(b) 8 Moore, 211; S. C. 1 Bing. 269.

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TINDAL, C. J.—We are of opinion that the Prothonotary ought to review his taxation in this cause. In cases of reference the general rule is, that, where the order of *Nisi Prius* is silent as to the costs of the reference and award, the arbitrator has no power to adjudicate upon them, but each party must bear his own expenses, and half the costs of the award. The case of *Tregoning v. Attenborough* may be distinguished from the present. There, the reference was clearly and entirely for the benefit of the defendant; and, therefore, the expenses of the reference were strictly and properly the party's expenses in the cause; for the amount of the verdict was to be ascertained by the arbitrator. Here, however, a very large field of inquiry was opened to the arbitrator, quite independent of the question at issue in the cause. A bargain has been made by the parties consisting of many particulars, and in which no mention is made of the costs of the reference. We think, therefore, that the costs of the reference in this case are not costs in the cause, but each party must bear his own costs, and half of those of the award.

Rule absolute.

MUSSELBROOK v. DUNKIN.

When the parties to an award have received notice that it is ready for delivery on payment of reasonable charges, it is to be considered as published.

TADDY, Serjt., and *Coleridge*, Serjt., shewed cause against a rule for setting aside an award. The facts of the case were, that an award was made in this cause by a barrister, under an order of *Nisi Prius*. It was ready for delivery on the 19th *May*, and notice of that fact was given to the parties. His charges being objectionable, they were taxed by the Prothonotary in the month of *July*. The award, however, was not taken up until the 24th *November*, when the defendant obtained it on paying the taxed charges. On the 26th of *November*, a rule for setting the award aside on various grounds, was obtained. That application, it was contended, was too late. It ought to have

been made before the last day of the term ensuing the publication of the award; analogously to awards made under the 9 & 10 *Will. 3*, c. 15. The publication was when the parties received notice that the award was ready for delivery. They cited *Rogers v. Dallimore (a)*, *Rawsthorn v. Arnold (b)*, and *Taylor v. Gregory (c)*.

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Wide, Serjt., and *Bompas*, Serjt., supported the rule, and contended, that an award could not be said to be published to a party before he knew what were its contents; and that the defendant had no notice of the contents until the 24th of *November*. The application in the present term would be in sufficient time, if made before the last day of it.

TINDAL, C. J.—The plaintiff, I think, comes too late. Where awards are made under the statute of *Will. 3*, applications such as the present must be made before the last day of the term next after the award has been made and published. It has been the practice to treat awards under orders of *Nisi Prius* in the same manner. No difficulty can arise as to the meaning of the word “made,” but the question is as to the meaning of the word “published.” I think it was published, when it was made, and notice of the fact given to the parties; and that they may obtain it on paying just and reasonable charges. I think, it cannot be said to be ready, when it can only be obtained by submitting to a wrongful demand. Here, however, all objection to the arbitrator’s demand was removed by the taxation of the Prothonotary in *July*.

PARK, J., BOSANQUET, J., and ALDERSON, J., concurred.

Rule discharged.

(a) 6 Taunt. 111. (b) 6 B. & C. 629. (c) 2 B. & Ad. 774.

B B B 2

1833.

Ex parte YATES.

If an attorney has been re-admitted in the *K. B.*, he may be re-admitted in the *C. P.* on reading the rule for his re-admission in the former Court, where he has been struck off the roll of this Court upon reading a rule for striking him off the roll of the *K. B.*

IN this case an attorney, named *Yates*, was struck off the roll of the *K. B.*, on the ground of his having been convicted of a misdemeanor. He was afterwards struck off the roll of this Court, on reading the rule for striking him off the roll of the *K. B.* The innocence of *Yates* being afterwards established to the satisfaction of the Judges of the *K. B.*, he was re-admitted an attorney of that Court. On reading the rule for his re-admission in the *K. B.*—

The Court made absolute a rule for his re-admission in this Court.

Rule absolute.

 FAIRCLOTH v. GURNEY, Clerk.

An application to set aside an annuity must be made *bond fide* on behalf of the grantor.

WILDE, Serjt., shewed cause against a rule for setting aside an annuity. It appeared from the affidavits in support of the rule, that the annuity was secured on ecclesiastical property, and certain policies of insurance, in which the grantor had a reversionary interest; that he had become insolvent, and his assignee had arranged with the grantee to sell the annuity, and the reversionary interest in the policies. The whole had been sold by auction, and the purchaser was unwilling to complete his purchase, until the opinion of the Court, as to the validity of the annuity, had been obtained. It did not, however, appear that the application was made on behalf of the grantor.

The Court required *Stephen*, Serjt., who had obtained the rule *nisi*, to shew that the application was made *bond fide* on behalf of the grantor. Not being able to shew this, the Court refused to hear him further on the motion.

FRASER v. CASE.

S.C. 9 Br. & L. 444, & 2 N. & S. 720.

WILDE, Serjt., applied for a *distringas* under the 2 & 3 Will. 4, c. 39, s. 3, in furtherance of the plaintiff's proceedings. His affidavit stated a variety of facts, from which it was not clear whether the defendant was in this country or abroad. His application did not state whether the object of the plaintiff was to compel an appearance, or to proceed to outlawry.

Under the 2 & 3 Will. 4, c. 39, s. 3, a *distringas* must be issued either to compel an appearance, or for the purpose of outlawry, but not in the alternative.

The Court observed, that, under the statute in question, a *distringas* might be obtained either to compel an appearance, or for the purpose of proceeding to outlawry. Where a defendant is not abroad, a *distringas* for the purpose of outlawry will not be granted. Where there is reason to believe that he is abroad, a *distringas* to compel an appearance will not be allowed. One state of circumstances or the other must be made out. Here, at least, you must make your election for which purpose you seek to obtain the *distringas*.

Wilde, Serjt., elected that the *distringas* should issue for the purpose of compelling an appearance.

Rule granted.

BARRATT v. PRICE.

BOMPAS, Serjt., shewed cause against a rule for discharging a defendant out of the custody of the sheriffs of London. The present defendant was also defendant in a former action, brought by another plaintiff. Bailable process was issued against him, and the warrant directed to *Wm. Jackson*, one of the serjeants-at-mace to the she-

If the sheriff has arrested a defendant in one action illegally, he cannot afterwards detain him in another.

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riffs of *London*. The arrest was, however, made without a warrant, by *Richard Jackson*, the son and assistant of *Wm. Jackson*. After the arrest, *Richard* gave the defendant into custody of a police officer, on a pretended charge of felony, and brought his father to the police station. The latter then attempted to make the arrest appear legal, by handing over the warrant to his son. On the ground of this fraud, a Judge's order was made in vacation, for the discharge of the defendant. Before the arrest of the defendant, a *ca. sa.*, at the suit of the present plaintiff, was lodged with the sheriffs; and on this he was detained. The present rule for his discharge was obtained on the ground, that, the arrest in the former action being illegal, a subsequent detainer could not be justified. In answer to this application, *Bompas*, Serjt., contended, that, though an arrest might be illegal, a subsequent detainer in another action was justifiable, except where a party was privileged from arrest. He cited *Howson v. Walker*, and *Crowden v. Walker* (a), *Spence v. Stuart* (b), *Davies v. Chippendale* (c), *Barclay and Others v. Faber* (d), and the authorities cited in 1 *Chit. Rep.* 579.

Wilde, Serjt., contended, that the principle on which these cases had been decided was, that, if the sheriff is not a party to the illegal apprehension, he can justify a subsequent detainer. He cited *Birch v. Prodger* (e).

Cur. adv. vult.

TINDAL, C. J.—The question here is, whether the same sheriffs can legally detain the defendant in custody under another writ, which they held against him at the time of such illegal arrest. We are of opinion that they cannot;

(a) 2 W. Bl. 823.

(d) 2 B. & Ald. 743.

(b) 3 East, 89.

(e) 1 N. R. 135.

(c) 2 B. & P. 282, 367.

and the ground of our opinion is, that the first arrest was rendered illegal by the wrongful act of the sheriff. The cases of *Davies v. Chippendale*, and *Barclay and Others v. Faber*, do not govern the present; for, in both those cases, the arrest was not an illegal act on the part of the sheriff. In both the sheriff acted in strict conformity with the exigency of the writ, though, upon objection to the affidavit of debt in the action at the suit of *A.*, the Court were of opinion that he had a right to be discharged. The case of *Howson v. Walker* is distinguishable from the present. There the illegal arrest of the defendant by *Herne* was not an act of the officer or the sheriff, but that of a stranger. Taking the defendant to prison, and charging him in the action at the suit of *Crowden*, was in fact a new arrest rather than a detainer. The sheriff was as much authorized in arresting the defendant in the second action, while he was illegally imprisoned, as if he had been at large. The principle to be drawn from the cases seems to be this, that, where the sheriff arrests a defendant, it operates as an arrest in all the actions in which the sheriff holds writs against him at the time; and this detainer will be good, although the party may upon collateral grounds, unconnected with the act of the sheriff, be discharged from the first arrest. Yet, where the sheriff has by his own act illegally arrested the defendant, the latter is not in custody under the first writ, but he is suffering a false imprisonment. That false imprisonment being no arrest in the original action, cannot operate as an arrest under the other writs lodged with the sheriff. We are, therefore, of opinion that the present rule must be made absolute.

Rule absolute.

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COOPER v. LEAD SMELTING COMPANY.

Where money has been paid into Court by a stakeholder to abide the event of a feigned issue under 1 & 2 W. 4, c. 58, the party succeeding cannot take out the money before judgment signed.

JONES, Serjt., moved for a rule *nisi* for the payment of a sum of money out of Court, which had been paid in under the 1 & 2 Will. 4, c. 58, the Interpleader Act, to abide the event of a feigned issue. The plaintiff had obtained a verdict, but had not yet signed judgment. He submitted that in general judgment was not signed on feigned issues.

Per Curiam.—The rule here applied for cannot be granted until judgment has been signed on the feigned issue. The proceeding under the Interpleader Act, the 1 & 2 Will. 4, c. 58, is to secure the company against the adverse claims of both parties to the issue. Section 2, of the act, 'makes the "judgment" in any such issue final and conclusive against the parties claiming. Until judgment, the company is not secured against future claims by the same parties for the same matter.

Rule refused.

WORLEY v. BLUNT.

Upon the count in a writ of right, if the demandant omit to set forth his pedigree, the Court will not allow him to amend.

GOULBURN, Serjt., shewed cause against a rule for amending the count in a writ of right, which omitted to set forth the pedigree of the demandant. The application was founded on an affidavit, which stated, that the omission was caused by the oversight of a pleader of experience at the bar, who, as such proceedings were so rare, did not know that it was necessary to set out the demandant's pedigree in the count. An affidavit was also produced, stating the nature of the demandant's title, and that he only sought to disturb a possession of thirty years. He urged, that the uniform practice of the Court had been, to refuse amend-

ments in writs of right; and cited *Dumsday v. Hughes* (a), *Charlewood v. Morgan* (b), *Hull v. Blake* (c), *Adamson v. Padway* (d), *Tooth v. Bodington* (e), and *Slade v. Dowland* (f).

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Stephen, Serjt., supported the rule, and cited *Webb v. Lane* (g), and *Goore v. Goore* (h).

TINDAL, C. J.—I have always understood, that it was the established rule of this Court, not to allow an error in a writ of right to be amended. Serjeant *Williams* so considered it; and his work is now esteemed a text book of our law. The objections to amendment in such cases are two. *First*, it would have a tendency to relax the vigilance which ought to belong to persons asserting contested claims, as the claimant ought to come to the Court within such a time, that his opponent may reasonably be expected to be prepared with evidence to defend his right. The *second* objection depends on the peculiar form of a writ of right, as it frequently occurs that the tenant can pursue no other course than to join the mise upon the mere right. He must, in that case, begin, and thus expose his whole title. The claimant, having thus obtained a knowledge of that title, may come the next year prepared to claim that portion of the property, to which his opponent appears to have the least secure title. Such a proceeding, therefore, is not entitled to favour. On examining the authorities, it appears that the Judges have uniformly refused such applications as the present. [His Lordship then examined the various cases which had been cited.] Here, then, is a uniform current of authorities, in which the Court has refused to

(a) 3 B. & P. 453.

(b) 1 N. R. 64.

(c) 4 Taunt. 572.

(d) 1 Marsh. 602.

(e) 8 Moore, 42; S. C. 1 Bing.

208.

(f) 5 B. & P. 577.

(g) 2 M. & P. 478; S. C. 5 Bing.

285.

(h) Roscoe on Real Act. 179.

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amend writs of right. There is nothing in the present case to distinguish it from those authorities; and therefore we must decide according to the general rule in such cases. The present rule must be discharged.

PARK, J., BOSANQUET, J., and ALDERSON, J., concurred.

Rule discharged.

KNIGHT v. BROWN.

If the general issue is pleaded to a declaration containing several counts, and the plaintiff obtains a verdict on one, and the defendant a verdict on the rest, the latter is entitled to have the costs of the counts found for him deducted from those of the counts found against him, under 1 *Reg. Gen. H. T. 2 W.* 4, s. 74.

COLERIDGE, Serjt., obtained a rule *nisi* for reviewing the Prothonotary's taxation in this case. It was an action of *assumpsit*. The plaintiff had a verdict on the fifth count in the declaration, and the defendant a verdict on all the remaining counts. The defendant had pleaded the general issue. The Prothonotary, on taxation, allowed the plaintiff the general costs of the cause, and no costs to the defendant. On this, it was contended, that the Prothonotary ought to have allowed the defendant the costs of those counts which had been found for him, under 1 *Reg. Gen. H. T. 2 Will.* 4, s. 74 (a). The words of that rule are, "No costs shall be allowed on taxation to a plaintiff, upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs." The costs of the counts found for the defendant must be considered as costs of issues found for him, as the general issue tendered an issue upon each of the counts of the declaration. The costs of those counts, therefore, ought to have been deducted from those of the plaintiff.

Wilde, Serjt., opposed the rule, and contended, that the

(a) *Ante*, p. 193.

issues raised by the general issue pleaded to a declaration containing several counts, were not such issues as were contemplated by the rule in question.

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Per Curiam.—Under the terms of this rule, we think that the costs of the counts found for the defendant, ought to have been deducted from those of the counts found for the plaintiff.

Rule absolute (a).

(a) See *Cox v. Thomason*, ante, p. 572, and *Richards v. Cohen*, ante, p. 533.

REGULA GENERALIS.

IT IS ORDERED, That, in case a rule of Court or Judge's order, for returning aailable writ of *capias* shall expire in vacation, and the sheriff or other officer having the return of such writ shall return *cepi corpus* thereon, a Judge's order may thereupon issue requiring the sheriff or other officer, within the like number of days after the service of such order, as by the practice of the Court is prescribed with respect to rules to bring in the body issued in term, to bring the defendant into Court, by forthwith putting in and perfecting bail above to the action; and, if the sheriff or other officer shall not duly obey such order, and the same shall have been made a rule of Court in the term next following, it shall not be necessary to serve such rule of Court, or to make any fresh demand thereon, but an attachment shall issue forthwith for disobedience of such

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order, whether the bail shall or shall not have been put in and perfected in the mean time.

T. DENMAN,	J. GURNEY,
N. C. TINDAL,	S. GASELEE,
LYNDHURST,	J. VAUGHAN,
J. BAYLEY,	J. PARKE,
J. A. PARK,	W. BOLLAND,
W. E. TAUNTON,	J. B. BOSANQUET,
E. H. ALDERSON,	J. LITTLEDALE.
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6. Cause cannot be shewn till an office copy is taken of the affidavit on which the rule *nisi* was obtained. *Brown v. Probert*, 659

7. An affidavit more than a year old, cannot be used on moving for a rule. *Burt v. Owen*, 691

8. An affidavit in support of a plea in abatement must strictly agree with the plea, and a variance in the christian name entitles the plaintiff to sign judgment. *Poole v. Pembrey*, 693

9. It is no objection to such an affidavit, that the addition of the defendant is not stated, though the rule of 5 H. T. 2 Will. 4, is general. *Ibid.*

10. *Semble*—Upon setting aside a plea in abatement for irregularity, no costs are allowed. *Ibid.*

AFFIDAVIT OF DEBT.

See REG. GEN. H. T. p. 184.

1. An affidavit of debt on an award ought to state the fact of the submission to, and the making of the award,

and that the money was due at a day now past. *Anonymous*, 5

2. An affidavit of debt on articles of agreement, should state the consideration. *Walker v. Gregory*, 24

3. Where an affidavit of debt was sworn by an administrator, a Frenchman, and the *jurat* did not state that the interpreter understood the *French* and the *English* languages, and the plaintiff's attorney acted as interpreter; and the process described the plaintiff as suing in his own right, and the affidavit stated the debt to be due in his representative character; and on search at the Prerogative Office, *Doctors' Commons*, but at no other ecclesiastical office, no letters of administration appeared to have been granted of the estate of the deceased to any one; but the *jurat* stated, that the affidavit had been read over and explained to the deponent in the *French* language, and that the interpreter was sworn upon his interpretation:—*Held*, that the affidavit was sufficient, and the Court therefore refused to discharge the defendant out of custody on filing common bail. *Marzetti v. Comte Du Joffroy*, 41

4. In an affidavit to hold to bail by an indorsee against the drawer, the default of the acceptor must be shewn. *Cross v. Morgan*, 122

5. The affidavit of debt on a bond must shew that the number of defaults in payment amounts to 20*l*. *Chambers v. Ward*, 139

6. The affidavit of debt in an action by an indorsee against the drawer, must allege the default of the acceptor. *Buckworth v. Levi*, 211

7. It is necessary in an affidavit of debt on a promissory note to state when the note is payable, or that it is overdue. If an affidavit of debt on several promissory notes is defective as to some of them, the Court will discharge the defendant on filing common bail, and will not order bail to be taken to the amount of the note, as

to which the affidavit is sufficient. *Kirk v. Almond*, 318

8. In an affidavit of debt on a bill of exchange, it is not necessary to state the amount of the bill. *Lewis v. Gompertz*, 319

9. In an affidavit of debt by an indorsee of a bill of exchange, it must be stated by whom the bill was indorsed; it is insufficient to state that it was *duly* indorsed. *Ibid*.

10. In an affidavit to hold to bail on a bill of exchange, it is not necessary to express the sum for which the bill was drawn. *Hanley v. Morgan*, 322

11. Where an affidavit of debt stated that the defendant was indebted to the plaintiff in 1000*l*., "on balance of account for money paid, laid out, and expended by the plaintiff, to and for the defendant, and at his request, and for money had and received by the defendant for the plaintiff, and for interest of monies due by the defendant to the plaintiff:"—*Held*, not sufficiently certain. *Visger v. Delegal*, 333

12. Where a defendant has been arrested in an action of *trover* by a Judge's order, the Court will not enter into the question of merits for the purpose of discharging him, on filing common bail. *Brackenbury v. Needham*, 439

13. Affidavit of debt "*A. B.*, clerk to *L. J. J. N.*, maketh oath that the defendant is indebted to the said *J. N.*;" the *quo minus* at the suit of *L. J. J. N.*:—*Held*, no variance. *Noel v. Williams*, 558

14. Where a plaintiff seeks to hold a defendant to bail for a sum of money, to which he alleges he has rendered himself liable for the defendant, he must shew clearly that that liability has been incurred. *Townsend v. Burns*, 562

15. In an affidavit of debt by an attorney's clerk, he may state the place of business of his employer as his residence. *Alexander v. Millon*, 570

AMENDMENT.

16. Where an affidavit to hold bail embraces several causes of action, and one of them is defectively stated, it vitiates the whole affidavit, and the defendant is entitled to be discharged *in toto* on entering a common appearance. *Baker v. Wells*, 631

17. To debt on a bail bond, a plea that there was no proper affidavit of debt, is bad on special demurrer. *Hume v. Liversedge*, 660

18. In an affidavit of debt for a certain sum for money had and received and money lent, it is not necessary to distinguish how much is due on each account. *Hague v. Levi*, 720

19. In an action by an indorsee against the drawer, the affidavit of debt should allege the default of the acceptor. *Banting v. Jadis*, 445

AMBASSADOR'S SERVANT.

See PRIVILEGE FROM ARREST, 1.

AMENDMENT.

See FINE, 4.—PLEA, 2.—RECOVERY, 2.—SCI. FA. 5.—VARIANCE, 6.

1. Proceedings in an action at the suit of assignees of a bankrupt were allowed to be amended by making the official assignee a joint plaintiff with the other assignees. *Baker v. Neaver*, 616

2. The 9 Geo. 4, c. 15, which authorizes a Judge to order amendments of variances in records, invests him with a discretion which cannot it seems be revised by the Court above. *Paraker v. Ade*, 643

3. In an action on a bill of exchange, by indorsee v. indorser, the bill was stated to have been drawn payable to the drawer's order, and by him indorsed to A. B., whereas it appeared in evidence to have been drawn in favour of A. B. The Judge having amended the record, the Court above approved of it. *Ibid.*

4. In an action against an indorser of

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a bill of exchange, though it is necessary to prove a presentment at the place pointed out by the acceptance, it is not necessary to allege in the declaration that the bill was accepted payable at that place; though, if such special acceptance is stated, there must be a corresponding allegation of a presentment. *Ibid.*

5. In an action for disturbance of a right of ferry, the declaration was allowed to be amended, after the cause had been taken down to the assizes and the record withdrawn, by introducing new counts, in which the terms of the ferry were varied, and also the description of the persons liable to toll. *Morris v. Evans*, 657

6. A plaintiff has a right to amend after plea, on payment of costs, under the rule *M. 1654*, s. 17; but whether he *must* pay costs on amending is a matter of discretion with the Court. *Wall v. Lyon*, 714

ANNUITY.

1. In the memorial of an annuity deed, it is not necessary to state a covenant by the grantor to insure his life for the benefit of the grantee; for that is a collateral matter. *Johnson v. Tweed*, 459

2. An application to set aside an annuity must be made *bonâ fide* on behalf of the grantor. *Faircloth v. Gurney*, clerk, 724

APPEARANCE.

See UNIFORMITY OF PROCESS ACT, 3, 4.

The plaintiff may enter an appearance for the defendant at any time within twelve months, and is not limited to the term after the return of the writ of *quo minus*. *Cook v. Allen*, 676

ARREST.

See COSTS, 12, 21, 34.—SERVICE OF PROCESS, 1.

1. An unprivileged person in cus-

tody in execution, elected a member of Parliament, is entitled to his discharge on motion; and, therefore, bail may have an *exoneretur* entered on the bail piece, if the privileged person be elected between perfecting bail and final judgment. And this was allowed, although a *cognovit* had been given with the express consent of the bail; and the plaintiff, had he not taken the *cognovit*, might have compelled a render before the defendant acquired privilege. *Phillips v. Wellesley*, 9

2. Where the plaintiff sued out serviceable process, and an order for particulars was made, and, two terms after suing out the serviceable process, he arrested the defendant:—*Held*, that the arrest was regular, although the order for particulars operated as a stay of proceedings in the first action. *Anonymous*, 59

3. If the *ac etiam* omit the words "on promises," the defendant can be holden to bail in the amount of 40*l*. only. *Anonymous*, 155

4. *Semble*, if he has been holden to bail in a greater amount than 40*l*., the Court will reduce the recognizance to that sum. *Ibid*.

5. A defendant when discharged from legal custody has no privilege from arrest in returning home. *Anonymous*, 157

6. If a defendant, being arrested, does not name any safe and convenient dwelling-house within the county in which he is arrested, he may be taken immediately to gaol, notwithstanding the 52 *Geo. 2*, c. 28, s. 2. *Pitt v. The Sheriff of Middlesex*, in the cause of *Hamilton v. Jones*, 201

See *Dewhirst v. Pearson*, 664

7. Where a plaintiff arrests a defendant, and on the trial recovers a part of his demand and his costs, he cannot afterwards hold the defendant to bail for another part of the same demand. *Hamilton v. Pitt*, 209

8. Where a defendant on three occasions voted in the character of a Scotch peer:—*Held*, that, after arrest, and giving a bail-bond, he was entitled to have the bail-bond delivered up to be cancelled. *Sir Henry Digby v. The Earl of Stirling*, 248

9. The defendant having been arrested, obtained his discharge by giving the plaintiff security for the debt. The security proving very inadequate, the plaintiff, without restoring the security, arrested the defendant for the same cause. The bail-bond was ordered to be delivered up to be cancelled, with costs, no fraud being imputed to the defendant. *Wilson v. Hamer*, 248

10. The petitioning creditor attending the commissioners for the purpose of watching the progress of the commission, and of proposing himself as an assignee, is protected from arrest *cundo, morando, et redeundo*: and it is for the party who seeks to oust him of his privilege, to shew an unreasonable delay, or an improper deviation from his course home. *Selby v. Hills*, 257

11. Where a defendant was arrested on a *capias* founded upon an affidavit on which a *capias* had previously issued into another county, upon which nothing was done:—*Held*, regular; and that the second *capias* need not be an *alias*. *Rodwell v. Chapman*, 634

12. After an arrest in a foreign country upon a judgment obtained there, the defendant, having escaped, may be again arrested here in an action on that judgment. *Aliven v. Furnival*, 614

13. Where goods are sold with a warranty, and the warranty is found to be false, the purchaser cannot therefore rescind the contract by endeavouring to return the goods, unless the defendant agrees to take them back, or unless an express right to

rescind is reserved at the time; and therefore, where a horse was sold warranted sound, and the horse proved to be unsound, but the seller refused to take back the horse, it was—*Held*, that the purchaser could not bring money had and received, and arrest for the price, having only a right to sue for damages. The seller having been arrested, and a less sum recovered, it was held to be an arrest without reasonable or probable cause, and that the defendant was entitled to his costs under the 43 Geo. 3, c. 46, s. 3. *Gompertz v. Denton*, 623

14. If a plaintiff, after making an affidavit of debt, receive part of the debt, and the debt is thereby reduced to an amount insufficient to warrant an arrest, and the defendant is, notwithstanding, afterwards arrested for the whole debt, the bail bond will be ordered to be set aside with costs. *Short v. Cunningham*, *Same v. Pound*, 662

15. To justify an officer in taking a defendant to a public-house, contrary to the 32 Geo. 2, c. 28, it is not sufficient for him to shew that the prisoner did not express his dissent. *Demhirst v. Pearson*, 664

A defendant arrested cannot be taken to gaol within twenty-four hours, unless he has refused to name a house to be taken to. *Ibid.*

The sheriff, or any of his officers or servants concerned in acting contrary to that act, is liable to the penalty. *Ibid.*

16. Where the plaintiff failed in recovering the sum for which he arrested the defendant, the Court allowed the defendant his costs under the 43 Geo. 3, c. 46, though the account was very long and had been running for several years; it appearing that there must have been either gross neglect or wilful overcharges in making out the account. *Hall v. Forget*, 696

This act is rather to be extended than confined in its operation. *Ibid.*

17. Where there is a reasonable
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doubt in law as to the right of the plaintiff to recover part of his demand:—*Held*, that the defendant was not entitled to claim the benefit of the 43 Geo. 3, c. 46. *Stovin v. Taylor*, 697

18. If the sheriff has arrested a defendant in one action illegally, he cannot afterwards detain him in another. *Barratt v. Price*, 725

ATTACHMENT.

See AWARD, 1, 2, 4.—COSTS, 24, 44.—MARSHAL, 1.—PONE, 1.—REG. GEN. H. T. 3 W. 4, p. 731.—SMALL DEBTOR, 1.—SUBPENA, 1, 2, 3.

1. After nine terms have elapsed, it is too late to object that a party in custody for non-payment of poors' rates has been charged and detained on an attachment of privilege, without leave of the Court or a Judge. *Goodman v. —*, 128

Where a defendant is committed, under a *habeas corpus*, to the custody of the Marshal, it is not necessary to enter a *committitur* piece on the judgment roll. *Ibid.*

2. The Court will not grant an attachment for the non-payment of costs payable under an award, at the instance of the personal representative of a deceased party, to which party they were to have been paid. *The King v. Maffey*, in the cause of *Maffey v. Goodwin*, 538

3. Though a party is at one time in contempt for not paying costs which have been duly demanded, yet, if before an attachment is moved for, the sum due becomes reduced in amount, a fresh demand of the reduced sum must be made to ground a motion for an attachment. *Spivy v. Webster*, 696

ATTORNEY.

See COSTS, 24, 43.—EJECTMENT, 13.—HUSBAND AND WIFE, 1.—NEW TRIAL, 2.—PLEA, 1.—1 REG. GEN. H. T. 2 W. 4, p. 196.

1. Where an attorney of the King's
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Bench has been arrested on process issuing out of the *Common Pleas*, the *King's Bench* will not relieve him summarily. *Anonymous*, 3

2. Where an attorney has drawn his own marriage settlement, under which he takes no interest, but is mentioned in it, and it is deposited with him for safety, the Court will not compel him to give it up at the instance of a trustee under it. *Ex parte Mozon*, 6

3. An attorney plaintiff suing an attorney defendant for a cause of action not exceeding 5*l.*, arising within the jurisdiction of the *London Court of Conscience Act*, 39 & 40 *Geo. 3*, c. 104, is not entitled to his costs. *Burn v. Pasmore*, 17

4. An attorney giving an undertaking for another, in a cause in which he is not concerned as attorney, will not be forced summarily to fulfil it; but the party to whom it is given will be left to his action. *Walker v. Arlett*, 61

5. A special agreement between an attorney and his client as to the amount of the charges of the former is not binding on the Master on taxation; but the Master may exercise his discretion under all the circumstances of the case, and make an allowance even to the amount stated in the special agreement. *Semble*, an attorney ought himself to peruse a title on the part of his client, before he sends it for counsel's opinion. *Drax v. Scroupe*, 69

6. Where a debtor applied to take the benefit of the insolvent act, and one of his creditors, an attorney, by threats of opposition, obtained from him promissory notes for the amount of his debt, and the creditor afterwards indorsed one of them to a *bond fide* holder, without notice of the circumstances under which it had been obtained; the debtor was afterwards arrested on the note, and he gave a bail bond—the Court directed the bail

bond to be delivered up to be cancelled, on filing common bail; but refused to make the attorney deliver up the other notes, though part of the debt for which they were given was work and labour done as an attorney, the notes having been obtained in his character of creditor and not of attorney. *Kay v. Masters*, 86

7. The Court will not, on a summary application, compel an attorney to deliver up, on payment of what is due to him, deeds which have been intrusted to him for the purpose of raising money upon them. *In the matter of Millard*, 140

8. Where a *cognovit* is given for the payment of a sum generally, the defendant may pay either the plaintiff or his attorney. *Anonymous*, 173

9. A conviction of conspiracy is not of itself a sufficient ground for striking an attorney off the roll. *Re* — 174

10. A defendant cannot object to the taxation of a plaintiff's bill of costs, on the ground of costs being allowed for a period of the cause during which it was conducted by a person not an attorney, or being an uncertificated attorney. — *v. Sexton*, 180

11. Where bills have been deposited with an attorney, and he has advanced money on them, and he refuses to account, the Court will not compel him summarily to pay over the alleged balance. *Ex parte Schwalbanker*, 182

12. A single instance of employment as an attorney at an election, is not a sufficient practising to entitle him to privilege from arrest. *Anonymous*, 208

13. A bill for business done under a commission of bankruptcy need not be delivered a month before action brought thereon. *Hamilton v. Pitt*, 210

14. Charges in an attorney's bill for attending and advising his client, after the latter had been served with

a writ, and attending and advising him in an action brought against him, are taxable items within the 2 Geo. 2, c. 23, s. 23. *Smith v. Taylor*, 212

Money advanced by the attorney to the defendant, to pay the debt and costs in the latter action, is a disbursement within the statute, and cannot be recovered in an action for money lent, although not included in the bill. *Ibid.*

15. The plaintiff obtained judgments against the defendant in two actions in this Court, and the defendant obtained a judgment against the plaintiff in the Court of *King's Bench*:—*Held*, that the defendant, upon acknowledging satisfaction for the amount of the judgments in this Court, on the judgment she had obtained against the plaintiff in the Court of *King's Bench*, might enter satisfaction on the judgment rolls in the two actions in this Court, although the plaintiff had died, and more than two years had elapsed before judgment had been entered up against her in the Court of *King's Bench*, the verdict having been obtained in her lifetime, subject to a reference, and a rule *nisi* to reduce the damages awarded by the arbitrator being pending at the time of her death:—*Held*, also, that the judgment for the plaintiff in this Court might be set off against the judgment for the plaintiff in the Court of *King's Bench*, although the plaintiff's attorney had administered to her effects as a judgment creditor, and sued out a writ of *elegit* against the defendant, and commenced ejectments to enforce it:—*Held*, also, that the attorney had no *lien* for his costs upon the judgments in this Court; and he having refused to allow them to be set off against the judgment in the *King's Bench*, the Court ordered him to pay the costs of the application. *Sarah Bridges v. Jane Smyth*, 242

16. Where an attorney's bill had been reduced *nearly* one-sixth on tax-

ation, the Court refused to allow him the costs of taxation. *Elwood v. Pearce*, 251

17. An undertaking by an attorney, to give a bail bond to the sheriff, is contrary to the 23 H. 6, c. 10, and therefore void. *Lewis v. Knight*, 261

18. Where a plaintiff and defendant collude in the settlement of an action, in order to deprive the plaintiff's attorney of his costs, and a bill for debt and costs is given by the defendant in furtherance of that collusion, the Court will compel the delivery up of that bill. *Gould v. Davis*, 288

19. Where one of several parties to a *cognovit* signs after the others, his signing relates back to the time of their signing. *Perry v. Turner*, 300

Payment to a plaintiff's attorney's clerk unauthorized to receive, is no waiver of the plaintiff's right. *Ibid.*

Where, at the instance of one of several joint defendants, the taxation of the plaintiff's costs is deferred, an entire day's notice of taxation on another day is not necessary. *Ibid.*

20. Where an attorney's bill has been paid, the Court will refer it to be taxed by the Master, on application within a *reasonable time*, without shewing circumstances of fraud or imposition. *Glasscott v. Castle*, 317

21. Where the amount of damages sought to be recovered in an action is liquidated, the parties may compromise, without regard to the plaintiff's attorney's claim to costs. *Ex parte Hart, In re Tovery v. Payne*, 324

22. An attorney is entitled to his costs for writing a letter demanding a debt from a defendant before writ issued. *Morrison v. Summers*, 325

23. It is a matter of doubt whether the Court has power, independently of the stat. 2 Geo. 2, c. 23, to refer an attorney's bill for taxation, when it contains no taxable item. *Dagley v. Kentish*, 330

24. The 3 Jac. 1, c. 7, s. 1, re-
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quires attornies to deliver to their clients a signed bill of their fees and charges before charging them:—*Held*, that that provision only applies to business done in the superior Courts of *Westminster*. *Reynal v. Smith*, 334

25. A rule cannot be served at the last place of an attorney's abode, unless it appears to be that stated in the residence-book, or that none is there stated. *Re Sandys*, 362

26. Service of a rule on an attorney by leaving it with a laundress at his chambers, who stated that she was authorized to receive notices and papers for him, is insufficient. *Dodd v. Drummond*, 381

27. An attorney who is party in a cause, giving an undertaking to the sheriff in that cause, is not liable to have that undertaking summarily enforced by the Court. *Northfield v. Orton*, 415

28. A bill against an attorney is not "process" within the meaning of 2 *Reg. Gen. H. T. 2 Will. 4*, and therefore does not require the indorsement of the amount of debt and costs claimed, as directed by that rule. *Lewellin v. Norton*, 416

29. Where an attorney's bills are referred for taxation to the Prothonotary of the *Common Pleas*, he may refer items for business done in the *King's Bench*, to be taxed by the Master of the latter Court, and the *King's Bench* has no jurisdiction to interfere with that taxation of the Master, nor is the Prothonotary bound by it. *In re Jones*, 424

30. Trover against an attorney for deeds; cause referred; award, a nonsuit, and each party to pay his own costs:—*Held*, that the attorney had no lien on the deeds for the costs:—*Held*, also, that he had no lien on the deeds for expenses incurred by him in consequence of applications made to him for the deeds. *In the matter of Sharpe*, 432

31. Where a defendant is entitled to enter a suggestion under the *Middlesex Court of Requests' Act*, the plaintiff is bound to find the record, or be answerable for the default of his attorney who withholds it. *Jones v. Harris*, 433

32. If, during the five years, an articulated clerk has been absent two months, by consent of his master, at his father's house, and at the end of the five years has served two additional months, he will be entitled to admission. *Ex parte Hubbard*, 438

33. If, during the five years, a clerk is assigned for a certain period, and at its conclusion reassigned to his original master, the name of the assignee must be stated in the notice of the clerk's intention to apply for admission. *Ex parte Jones*, 439

34. A warrant of attorney given by a client to his attorney to secure future costs, is illegal. *Jones v. Hunter*, 462

35. Where an attorney of one Court gives his undertaking as an attorney for a debt and costs in an action in another, the Court of which he is an attorney will compel him to fulfil his undertaking, though void by the statute of frauds. *In re Paterson*, 468

36. Unless there is a cause in Court, an application cannot be made at Chambers against an attorney. *Ex parte Higgs*, 495

37. The Court will not grant an application requiring an attorney to pay over the interest of a sum of money which has come improperly into his hands. *Fenn v. Wild*, 498

38. All matters relating to the readmission of attornies must be settled in term time, in Court, and not at Chambers. *Ex parte Owen*, 511

39. The undertaking of an attorney can only be enforced by attachment, where he has given it for his client. *Ex parte Watts*, 512

40. An attorney, intending to apply for re admission, stuck up his no-

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tice in the *King's Bench* office at its opening, on the first day of the term of which his notice was intended to be given:—*Held*, a sufficient compliance with the rule of *T. T. 33 Geo. 3. Ex parte Senior*, 517

41. A warrant of attorney given to secure the payment of future costs, and also of costs and money already due and advanced, though void as to the clients' future liability, is valid as to his actual liability. *Holdsworth v. Wakeman*, 532

42. The fact of a judgment being signed by an uncertificated attorney, does not make it irregular. *Smith v. Wilson*, 545

43. The Court has a discretionary power, where an action is brought on an attorney's bill, to refer it for taxation, without requiring the undertaking provided by the *2 Geo. 2, c. 23. Watson v. Postan*, 556

44. Applications to tax an attorney's bill for business done in lunacy, should be made to the Chancellor. *Quære*, whether a bill for business done in lunacy is taxable. *Jones v. Byewater*, 557

45. If an attorney practise in a Court in which he has not been admitted, he cannot maintain an action for his fees, nor even for money out of pocket; neither has he any lien for his costs or for money disbursed; and therefore he cannot prevent the damages and costs in one action being set off against those in another, though his costs have not been paid. *Latham v. Hide, Hide v. Latham*, 594

46. If an attorney acts in a Court of which he is not admitted, proceedings will be staid, and he will be ordered to pay the costs; and it is not too late to apply even after issue joined and notice of trial given. *Constable v. Johnson*, 598

47. The jury have a right, in considering an attorney's bill, to reject any item which is altogether useless; but have not a right to reject an item,

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a part of which may be useless. *Shaw v. Arden*, 705

48. An attorney's bill for business done at Quarter Sessions must be delivered, pursuant to *2 Geo. 2, c. 23*, a month before action brought. *Sylvester v. Webster*, 708

49. A party cannot compel his attorney to proceed in a suit until it is ended; but the latter may, upon reasonable cause and notice, relinquish the conduct of the suit, and recover his costs incurred during the time of his employment. *Vasandau v. Browne*, 715

50. If an attorney has been re-admitted in the *K. B.*, he may be re-admitted in the *C. P.* on reading the rule for his re-admission in the former Court, where he has been struck off the roll of this Court upon reading a rule for striking him off the roll of the *K. B. Ex parte Yates*, 724

AUTHORITY TO PROSECUTE OR DEFEND.

See 1 REG. GEN. H. T. 2 W. 4, p. 183.

AWARD.

See AFFIDAVIT OF DEBT, 1.—ATTACHMENT, 2.—COSTS, 3, 10, 22, 44.

1. Where an arbitrator finds by his award, that, on the balance of accounts, the defendant has overpaid the plaintiff a certain sum, the Court will not grant an attachment against the plaintiff for the non-payment of that sum. *Thornton v. Hornby*, 237

2. Where an award directs the payment of money on a certain day, interest from that day may be recovered by *action*, but not by *attachment*. *In the matter of Arbitration between Churcher and Stringer*, 332

3. A submission to refer a cause, and the subject-matter thereof, and the *issue therein*, to the award of a barrister, does not authorize him to

order a verdict to be entered up. *Hutchinson v. Blackwell*, 267

4. The Court will not grant an attachment for the non-performance of an award, the performance of which is demanded by a third person acting under a power of attorney, unless the subscribing witness makes an affidavit of its execution, and a copy of the power of attorney is left with the party upon whom the demand is made. *Laugher v. Laugher*, 284

5. Where the words of a release, executed according to the directions of an award, might extend to a matter the parties did not intend the arbitrators to adjudicate upon, and on which they did not adjudicate, the generality of the words will be restrained by the intention of the parties. *Upton v. Upton*, 400

6. In an award, the direction to enter a verdict in favour of a plaintiff for a certain sum is equivalent to an order to pay that sum. *Cartwright v. Blackworth*, 489

7. The mere fact of an arbitrator being indebted to one of the parties is not of itself sufficient to set aside an award, though the other party was ignorant of the circumstance, and, as soon as he knew of it, objected to the arbitrator's proceeding. *Morgan v. Morgan*, 611

8. Where an arbitration is under an order of *Nisi Prius*, the costs of it are not costs in the cause. *Taylor v. Gordon*, 720

9. When the parties to an award have received notice that it is ready for delivery on payment of reasonable charges, it is to be considered as published. *Musselbrook v. Dunkin*, 722

BAIL.

See HABEAS CORPUS, 1.—REG. GEN. T. T. 1 W. 4, p. 102; 1 REG. GEN. H. T. 2 W. 4, p. 185.—VARIANCE, 2, 4, 14.—WAIVER, 5, 8.

1. A bail who expects the attorney

for the defendant to indemnify him, though he has received no undertaking to that effect, cannot justify. *Anonymous*, 1

2. A leaseholder not a housekeeper or a freeholder cannot justify as bail. *Smith's Bail*, 1

3. In an action against several, it is no objection to the notice of justification, that it states, that the bail will justify for three, bail for two having only been put in. *Denton's Bail*, 2

4. Where the Court will grant time to put in fresh bail in error. *Anonymous*, 32

5. Where a poor defendant was arrested for 700*l.*, the Court granted a rule to justify three bail instead of two. *Easter v. Edwards*, 39

6. "Manufacturer" is a bad description of bail. *Fearnley's Bail*, 40

7. A lodger in England, possessed of a house in Scotland, cannot justify as bail. *Anonymous*, 61

8. Though the form of the affidavit to be made by bail, according to the new rules of *Trinity Term*, 1 *Will.* 4, is several, it may be made jointly. *Anonymous*, 115

An affidavit of sufficiency by country bail, purporting to be according to the rules of *Trinity Term*, 1 *Will.* 4, and not containing all its requisites, is good, if it be sufficient according to the old rules. *Ibid.*

9. It is sufficient, under the rules of *Trinity Term*, 1 *Will.* 4, to state the residence of the bail for the last six months in the notice of bail, without repeating it in the notice of justification. *Higg's Bail*, 124

10. The domestic servant of a foreign ambassador cannot become bail. *Lock's Bail*, 124

11. Where there is a defect in the notice of bail, and further time is given to inquire as to them, and they ultimately justify, the defendant is not entitled to the costs of justification. *Anonymous*, 126

12. Bail must swear themselves

"housekeepers;" swearing themselves "householders" is not sufficient. *Anonymous*, 127

13. If money has been paid into Court to abide the event of the suit under the 7 & 8 Geo. 4, c. 71, s. 2, and the defendant wishes to take it out on perfecting special bail, under s. 3, he must do so before issue joined. Money so paid is not a payment to a creditor within the protection of the 6 Geo. 4, c. 16, s. 82. *Ferrall v. Alexander*, 132

If paid in after an act of bankruptcy, and less than two months before a commission issued, it is not within the protection of the 6 Geo. 4, c. 16, s. 81. *Ibid.*

14. It is not enough, in the affidavit of sufficiency, according to the rules of T. T. 1 Will. 4, that the bail should describe himself as possessed of "money in the funds," without stating in what fund it is. *Anonymous*, 159

15. If a bail has two places of residence, it is only necessary under Reg. Gen. T. T. 1 Will. 4, to give one of them in the notice. *Anonymous*, 159

16. Keeping a gambling house is not a ground for rejecting bail; and, if allowed, is not a ground for refusing the defendant the costs of justification under rule 3, Reg. Gen. T. T. 1 Will. 4. *Anonymous*, 160

17. By the rules of T. T. 1 Will. 4, it is only necessary in the notice of bail to state the residence of the bail for the last six months, without going on to state that the bail has resided there for that period; but it must state the bail to be a housekeeper or a freeholder, although accompanied by the affidavit under rule 3, T. T. 1 Will. 4. *Anonymous*, 160

18. If bail justify by affidavit, in pursuance of the new rules of T. T. 1 Will. 4, the notice must be accompanied either by the original affidavit, or by a copy purporting upon the

face of it to be a copy. *West v. Williams*, 162

19. Where the property of which the bail describes himself possessed in his affidavit, according to the third rule of T. T. 1 Will. 4, is insufficient, the Court will not allow him to justify without payment by the defendant of the costs of opposition, although possessed of sufficient other property. *Jackson's Bail*, 172

20. When bail cannot justify in respect of the property described in the affidavit of justification, but are allowed to pass on justifying for other property, the plaintiff is entitled to the costs of the opposition. *Hemming v. Blake*, 179

21. The acceptor of a dishonoured bill of exchange is not competent to become bail in an action against the drawer. *Anonymous*, 183

22. Rule 2 of T. T. 1 Will. 4, as to notice of bail, applies to both town and country bail. *Anonymous*, 259

23. Omission in the notice of bail to describe the bail as housekeepers and freeholders, does not, under the rule of T. T., 1831, authorize the plaintiff to take an assignment of the bail-bond. The objection should be made when the bail come up. *Bell v. Foster*, 271

24. Where a defendant omits to give notice of justification, as required by 1 Reg. Gen. T. T. 1 Will. 4, the plaintiff has twenty days to except, as under the old practice. *Goddard v. Jarvis*, 278

25. In this Court, if the bail be once successfully opposed, they cannot justify until 5l. has been deposited with the Master to cover the costs. *Smith v. Cooper*, 287

26. Where bail reside within ten miles of the city of London or Westminster, they must justify in person. *Anonymous*, 293

27. By 2 Reg. Gen. T. T. 1 Will. 4, it is sufficient to state in the notice of bail the residence of the bail for the

last six months, without going on to state that such was their residence during that period. *Fenton v. Warre*, 295

28. Where a defendant is in custody under a warrant of commissioners of bankrupt, the Court will enlarge the time for rendering the defendant, though the bail have not justified. *Gibson v. White*, 297

29. A plaintiff is entitled to have money paid into Court in lieu of bail, paid out to him, if special bail be not perfected in due time, although the defendant has rendered since the time for perfecting bail, unless an affidavit of merits is produced. *Newman v. Hodgson*, 329

30. Under rule 2, *T. T. 1 Will. 4*, the actual and not the constructive residence of the bail must be stated. *Thomson v. Smith*, 340

31. If time to justify bail be granted, the defendant must pay the plaintiff's costs of attending to oppose. If the copy of the affidavit of sufficiency served on the plaintiff do not purport to be a copy, or do not state the names of the parties, and the sums in the actions in which they are already bail, or the names of the occupants and numbers of the houses stated by the bail to be in their possession, these defects are not grounds for rejecting the bail, but for disallowing the defendant his costs of justification. *De Bode's Bail*, 368

32. The costs of opposing bail, who have complied with rule 3, *T. T. 1 Will. 4*, but are rejected, are granted as a matter of course to the plaintiff, unless some very strong ground is shewn on the part of the defendant, for putting in bail who could not justify. *Evans's Bail*, 384

33. A notice of justification, stating that the bail has "*within* the last six months resided," &c., is not sufficient under *Reg. Gen. T. T. 1 Will. 4, s. 2*. *Johnson's Bail*, 438

34. If a plaintiff alarm bail who

have been put in, and thus prevent them from justifying, the Court will compel him to pay the costs of putting them in. *Gwynne v. Fuller*, 444

35. 4 *Reg. Gen. T. T. 1 Will. 4*, which entitles defendants to have the recognizance entered into under rule 3, if no exception be entered by the plaintiff, out of Court, without further justification, does not apply to the case of a prisoner. *Webb's Bail*, 446

36. A mere honorary obligation on the part of a plaintiff not to press a defendant for payment of debt and costs, is not such an indulgence to him as will release his bail. If a plaintiff, by an agreement with a defendant, expedites his remedy against him, the bail are not thereby released. *Ladbrook v. Hewett*, 488

37. It is not necessary that a bail should sleep in the house described in the notice of bail as his residence. Costs of justification will sometimes be refused, although the bail have passed. *Thomson's Bail*, 497

38. The residence of a bail is sufficiently described by stating it to be at a place well known as a village, without mentioning any street in it. *Smith's Bail*, 499

39. To describe bail as "jewellers," when they are merely clerks in a jeweller's shop, is a mis-description. *Hamlet's Bail*, 501

40. The rules of *T. T. 1 Will. 4*, requiring four days' notice of bail, do not apply to the case of a prisoner. *King's Bail*, 509

41. Where bail, having made the affidavit required by rule 3, *T. T. 1 Will. 4*, justify after exception, although the plaintiff does not appear to oppose, the defendant is still entitled to the costs of the justification. *Johnson's Bail*, 514

42. Where a bail swears, under rule 3, *T. T. 1 Will. 4*, "that he is not bail for any," without adding "other person," it is sufficient. *Smith's Bail*, 514

43. Where bail is added by a Judge's order, four days' notice of bail need not be given. *Perry's Bail*, 564

44. In an affidavit of justification, it is insufficient to state that the bail are *possessed* of the required property. *Hutchinson's Bail*, 571

45. Notice of bail, describing the bail to have resided within the last six months (instead of, for the last six months) at a particular place, is bad; but if the affidavit of justification is correct, it may be connected with the notice, so as to make the notice sufficient. *Ward's Bail*, 596

46. It is not sufficient for bail to swear that they are possessed of so much money over and above their just debts, but they must say that they are "worth" such sum. *Simpson's Bail*, 605

47. An affidavit of justification may be sufficient, if the rule of Court is substantially complied with, though in form it may not be exactly conformable with that given by the rule. *Perry's Bail*, 606

48. In a notice of bail for a prisoner to justify at the time of putting in, it must appear that the defendant is a prisoner. *Creighton's Bail*, 609

49. Where proceedings have been taken on the bail-bond before the bail come up to justify, the payment of those costs cannot be insisted on as a preliminary objection. *Wilson's Bail*, 614

50. An agent for the sale of *Scotch* ale, who described himself as a gentleman in the notice of bail, was held to be misdescribed. *Fleming's Bail*, 641

51. Where, in the course of a cause, an order was made for taxing the bill on which the action was brought, and which by mistake was drawn up as a stay of proceedings:—*Held*, that the bail could not avail themselves of that order as a giving of time, so as to discharge them. *Woosman v. Wood*, 681

An agreement between the plaintiff and defendant, that the plaintiff's bill should not be taxed:—*Held*, not binding upon the bail. *Ibid.*

52. If the affidavit of justification states that the bail are "possessed" of a certain sum, instead of "worth," the affidavit is insufficient and must be amended. *Rogers v. Jones*, 704

53. An expectation that a cause would be settled, is not sufficient to entitle a defendant to change his bail. *Orchard v. Glover*, 707

BAIL-BOND.

See 1 REG. GEN. H. T. 2 W. 4, p. 186; 5 REG. GEN. H. T. 2 W. 4, p. 199.

Where regular proceedings have been commenced upon a bail-bond, and the defendant has rendered after the time for perfecting bail above, the Court will order the bail-bond to stand as a security, under rule 5, *Reg. Gen. H. T. 2 Will. 4. Hodge v. Hopkins*, 431

BANKRUPT.

See BAIL, 13.—COSTS, 32.—RENDER, 1.

BILL OF EXCHANGE.

See AMENDMENT, 2.

CAUSE LIST.

The Court in *banc* has no jurisdiction over the cause list at *Nisi Prius*. *Jacob v. Rule*, 349

CESTUI QUE TRUST.

See WARRANT OF ATTORNEY, 6.

CERTIORARI.

See COSTS, 47.—POOR'S RATES, 1.

1. The return of a *certiorari* must return the record itself, and not set it out according to its tenor. *Askew v. Hayton*, 510

2. Where one inhabitant of a parish has removed an indictment against it,

for the non-repair of a road, into the *King's Bench*, and has given the usual security for costs, in case a verdict of guilty should pass, the other inhabitants of the parish will not be permitted to plead guilty to the indictment. *Rez v. The Inhabitants of Laxborough*, 527

3. Where the Sessions have granted a special case, which has not been settled for more than six months after being granted, the *certiorari* for removing the orders of magistrates and sessions must be sued out within six months from the time of granting the case. If it is not so sued out, this Court will not grant a *mandamus* to compel the sessions to enter continuances and hear the appeal. *Rez v. Justices of Staffordshire*, 484

CHAMBERS (JUDGE'S).

See ATTORNEY, 36.—COSTS, 4, 20.

COMMITTITUR.

See ATTACHMENT, 1.

CONCURRENT WRITS.

1. Where a *fi. fa.* has issued, and a levy less than the plaintiff's debt has been made, a *ca. sa.* cannot issue till after the return day of the *fi. fa.*; although in fact the sheriff has made a return to it, and the *ca. sa.* recites the writ and the sheriff's return. *Laves v. Codrington*, 30

2. If a plaintiff sues out serviceable process, and, without discontinuing, sues out bailable process for the same cause of action, the defendant may plead the pendency of the former suit, and the Court will not relieve the plaintiff. *Prescott v. Stevens*, 57

3. A plaintiff cannot have concurrent writs of *fi. fa.* and *ca. sa.*, and act under both. *Hodgkinson v. Whalley*, 298

4. If a defendant is in custody of the sheriff, and a *test. ca. sa.* is issued against him, the delivery of the *ca. sa.*

to the sheriff is sufficient to charge him in execution. *Owen v. Owen*, 338

5. The omission of a return day in the *præcipe* for a bill of *Middlesex*, is not an irregularity. *Green v. Elgie*, 344

If a *fi. fa.* on a judgment have been executed, but not returned, and the defendant is arrested in an action on the judgment, the Court will not set aside the arrest. *Ibid.*

If an *ac etiam* is in *assumpsit*, and the affidavit to hold to bail is in debt, the Court will discharge the defendant on putting in bail to the amount of 40*l.* *Ibid.*

6. Where a defendant is arrested on a *ca. sa.* and is afterwards removed from the custody of the sheriff on process from the Court of *Chancery* into the *Fleet*, he is sufficiently charged in execution in the *Fleet* on the *ca. sa.* without bringing him up by *habeas corpus*, and charging him again in execution. *Searl v. Johnson*, 384

COGNOVIT.

See 1 REG. GEN. H.T. 2 W. 4, p. 192.

1. A judgment and execution on a *cognovit*, not filed according to the provisions of the 3 *Geo. 4*, c. 39, are not absolutely void, but only inoperative against the assignees of a bankrupt. *Green v. Gray*, 350

2. A *cognovit* does not require a stamp, though containing a stipulation not to take advantage of its being given before declaration. *Ibid.*

CORONER.

See PROCESS, 3.

COSTS.

See AMENDMENT, 4.—ARREST, 16, 17.

—ATTACHMENT, 2, 3.—ATTORNEY, 5, 10, 13, 16, 22.—AWARD, 8.—BAIL, 51.—EXECUTION, 5.—1 REG. GEN. H.T. 2 W. 4, p. 193.—SMALL DEBTOR, 5.—SOLICITOR, 1.

1. Where an appeal against a poor

rate has been entered and abandoned, the respondents are entitled to costs under the 17 Geo. 3, c. 38, s. 4, up to the time of abandonment. *Ex parte Holloway*, 26

It is a good practice for the clerk of the peace to ascertain the amount of the costs in such cases. *Ibid.*

2. In *quo warranto* informations, the Court will not force an indigent relator to give security for costs, when it does not appear that the fact of indigence had not come to the defendant's knowledge before issue joined. *Rex v. Day*, *Rex v. Patteson*, 32

3. When an award is taken up by one party, and all the costs paid to two out of three arbitrators, the third arbitrator has no remedy against either party in the cause. *Seemle*, an arbitrator has no action for his fees. *Burroughes v. Clarke*, 48

4. A Judge cannot grant costs at Chambers. *Anonymous*, 52

5. Where a defendant pleads after it has come to his knowledge that the plaintiff is abroad, the Court will not oblige the latter to give security for costs. *Brown v. Wright*, 95

6. Taxation of costs, without payment of them after a summons to discontinue, is no discontinuance. *Edgington v. Proudman*, 152

7. The Court will disallow the costs of a view, unless the names of the shewers are inserted in the writ of view. *Taylor v. Thompson*, 218

8. The Court will not allow costs, to which a party may probably be entitled in one action, to be set off against costs to which he is absolutely liable in another. *Masterman v. Malin*, 222

9. The Court will, under particular circumstances, compel the payment by the unsuccessful party of the expenses of bringing over from a foreign port, detaining here, and sending home, a witness, although the cause never proceeds to trial. *Lonerger v.*

The Royal Exchange Assurance Company, 223

10. Costs of a reference are costs in the cause, where the reference is for the benefit of the unsuccessful party. *Tregoning v. Attenborough*, 225

11. Costs of a nonsuit are not a debt proveable under a commission of bankrupt issued before signing judgment, although the judgment relates back to a time previous to the commission issuing. *Brough v. Adcock*, 231

12. Plaintiff arrested defendant for 500*l.* Plea, coverture. Verdict for 38*l.*, for money advanced since her husband's death. Defendant applied for costs under 43 Geo. 3, c. 46, s. 3:—*Held*, that, to obtain her costs, it must be shewn that the plaintiff knew of her coverture at the time of the arrest. *Spooner v. Mary Danks*, 232

13. Reasonable allowance in costs may be made for the loss of time of a necessary foreign witness, who is not accessible to *subpoena*, and who will not attend without compensation. *Lonerger v. The Royal Exchange Assurance Company*, 233

14. The plaintiff sued out a *f. fa.* against Lord Egmont's effects. Lord E. having previously assigned all his effects to trustees, for the benefit of his creditors, the sheriff (under an indemnity from the trustees) returned *nulla bona*. The plaintiff sued the sheriff for a false return. The sheriff obtained a verdict. The Court refused to allow the plaintiff's judgment to be set off against the costs of the action against the sheriff. *Hewitt v. Pigott*, *Same v. Lord Egmont*, 250

15. The Court will not enter into the question of the defendant's liability to pay costs, under the *Bath* Court of Requests Act, before verdict. *Meredith v. Dren*, 252

16. What allowance on taxation shall be made for the subsistence of

the master of a vessel, from the time of his subpoena till the trial, in an action on a policy of insurance, and afterwards while a rule is pending for a new trial, is, in general, a matter in the discretion of the Prothonotary.

Mount v. Larkins, 262

17. When, by order of *Nisi Prius*, a verdict is entered in favour of the plaintiff for nominal damages, and the costs of the action, and the plaintiff is to pay the defendant a certain sum, that sum may be set off against the costs in the cause. *Newton v. Newton*,

264

18. Interlocutory costs may be set off against final costs, subject to the attorney's lien. *Doe d. Hope v. Carter*,

269

19. Before moving for security for costs, an application must be made to the opposite party to give security.

Adams v. Brown, 273

20. A Judge at Chambers has power to award costs. *Doe d. Prescott v. Roe*,

274

21. The Court will not allow costs under the 43 Geo. 3, c. 46, s. 3, to a defendant who had not been actually arrested or held to special bail. *Amor v. Blofield*,

277

22. A *sci. fa.* having issued upon a recognizance to abide an award, concerning matters in difference upon an extent in aid, and the defendant having succeeded on demurrer:—

Held, that he was not entitled to costs. *Rex in aid of Hollis v. Bingham*, 280

23. If a *venire de novo* be awarded, the Court has no power over the costs of the application for that writ. *Edwards v. Brown*,

282

24. Where a rule *nisi* was obtained for setting aside an attachment for irregularity, and the defendant's attorney offered to waive the proceedings, and pay the costs, but the rule was persisted in, the Court made the rule absolute with costs, up to the time of the offer, the plaintiff's attorney pay-

ing the costs subsequently incurred.

Halton v. Stocking, 296

25. Security for costs may be applied for after an order for time to plead. *Wilson v. Minchin*,

299

26. If one of two plaintiffs be resident abroad, and the other in this country, the Court will not compel the absent plaintiff to give security for costs. *Anonymous*,

300

27. Where a plaintiff recovers less than 10*l.* in a transitory action against a defendant resident within the jurisdiction of the Bath Court of Requests Act, the defendant is entitled to enter a suggestion to deprive the plaintiff of his costs, although plaintiff resides in London, and the cause of action did not arise within the local jurisdiction.

Graham v. Browne, 309

28. When full particulars of a plaintiff's demand would exceed three folios, the Court will compel the plaintiff to deliver to the defendant full particulars of his demand, the defendant paying the costs of those particulars, and, if necessary, taking short notice of trial. *James v. Child*, 310

29. The Court will compel a plaintiff resident out of the jurisdiction to give security for costs, although no previous application has been made to the plaintiff's attorney, or notice of the motion given. But without such application or notice, the rule *nisi* will not stay proceedings. The stage of the proceedings at the time of the motion need not be stated by the defendant; it is for the plaintiff to shew that it is too late. *Jones v. Jones*, 313

30. If a plea is delivered after the time for pleading is out, but before judgment signed, of which the plaintiff's attorney is apprized, and he afterwards signs judgment, it is irregular, and the plaintiff's attorney must pay the costs of the application to set it aside. *Amphill v. Semple*, 316

31. A witness attending the trial of a cause on subpoena cannot main-

tain an action for compensation for his loss of time in attendance. *Collins v. Godefroy*, 326

32. The 6 *Geo.* 4, c. 16, s. 44, which grants double costs to successful defendants, who have acted under the authority of that stat., does not apply to assignees, or those acting under their authority. *Worth v. Bubb*, 328

33. Where a defendant in trespass pleads not guilty to the declaration, and suffers judgment by default to a new assignment, but leaves the general issue on the record, the plaintiff being thus compelled to prove his whole case, he will be entitled to the general costs of the cause, although the issue on a special plea covering the declaration has been found for the defendant. *Broadbent v. Sham*, 336

34. If a defendant be arrested on process from the *Palace Court*, and the cause is removed into the Court of *K. B.*, and the plaintiff does not recover to the amount sworn to in the affidavit of debt, the defendant is not entitled to his costs under the 43 *Geo.* 3, c. 46, s. 3. *James v. Danson*, 341

35. A separate motion is not necessary for the costs of the day for not proceeding to trial, where the rule for judgment as in case of a nonsuit is discharged. *Piercy v. Owen*, 362

36. The Court will compel a plaintiff executrix, who is out of the jurisdiction, to give security for costs; but such security will be confined to those costs only for which she would be liable. *Chamberlain v. Chamberlain*, 366

37. Where a plaintiff recovers less than 40*s.* against a defendant, resident within the jurisdiction of the *Middlesex Court of Requests Act*, and his demand has not been reduced by set off, the defendant is entitled to double costs. *Jones v. Harris*, 374

38. Partners keeping a counting-house only, for the purpose of receiving orders, in the city of *London*, and carrying on business at *Liverpool* also,

are not within the provisions of the *London Court of Requests Act*, the 39 & 40 *Geo.* 3, c. 104, s. 12. *Reeves v. Stroud*, 399

39. In an action for slanderous words which are actionable only because spoken of and concerning the plaintiff in the way of his business, less than 40*s.* being recovered, the plaintiff is only entitled to the same amount of costs as damages, under the 21 *Jac.* 1, c. 16, s. 6. *Grenfell v. Pierson*, 406

40. The Master is in general sole judge of what witnesses shall be allowed on taxation; and therefore where he had, in an action for libel, disallowed all witnesses to prove innuendoes, the Court refused to interfere to make him review his taxation. *Skelton v. Seward*, 411

41. Trespass for breaking and entering plaintiff's close. Pleas, *lib. ten.*, and four special pleas. Replication, issue on all the pleas, and a new assignment. Judgment by default on all the trespasses new assigned, and a relinquishment of the four last pleas, as far as they related to the new assigned trespasses. One shilling damages assessed on the judgment by default. Record went down for trial, and a verdict found for the plaintiff on the plea of *lib. ten.*, and for the defendant on all the other pleas:—*Held*, that, as the defendant had left the plea of *lib. ten.* to the declaration on the record, the plaintiff was forced to go down to trial; and, therefore, was entitled to the general costs of the cause. *Forester v. Dale*, 412

42. Where a rule is made absolute for issuing a prohibition, the costs of the rule cannot be granted to the successful party under 1 *Will.* 4, c. 21, s. 1, that statute only applying to cases where there have been pleadings in prohibition. *Rez v. Keeling*, 440

43. The rule for an attachment for non-payment of costs, between attor-

ney and client, pursuant to the Master's *allocatur*, is *nisi* in the first instance. *Bray v. Yates*, 459

44. When the whole interest of a party in an award is assigned to another, the Court will not compel the latter to give security for costs in an action brought by the former upon the award. *Day v. Smith*, 460

45. Commissioners of a Court of Requests, who have power to commit for contempt, are not within the 42 Geo. 3, c. 85, s. 6, which extends the 21 Jac. 1 (giving double costs) to all persons empowered to commit to safe custody: and, therefore, where trespass for false imprisonment is brought against them for an act done in the execution of their office, and the plaintiff is nonsuited, they are not entitled to double costs. *Mackey v. Goodden*, 463

46. In trespass, the defendant pleaded, *first*, not guilty; and, *secondly*, justification. Issue on the first plea, traverse to the second, and new assignment for excess. Issue joined on the traverse, plea of not guilty withdrawn, &c., judgment by default on the new assignment. *Nol. pros.* as to the issue on the second plea, and writ of inquiry executed on the judgment by default:—*Held*, that the plaintiff was only entitled to the costs of executing a writ of inquiry. *Rud-dock v. Smith*, 467

47. Where an indictment on the 7 & 8 Geo. 4, c. 30, s. 16, is removed by *certiorari* into the *King's Bench*, and is tried on a record issuing out of that Court, the expenses of prosecution cannot be allowed under the 7 Geo. 4, c. 64, s. 22. *Rex v. Kelsey*, 481

48. Where, after verdict for plaintiff, subject to a special case, one of the defendant's pleas is held bad, he is not entitled to the costs of witnesses in support of that plea. *Cartwright v. Cook*, 529

49. Where a plaintiff succeeds on

one of several issues, and the defendant succeeds on the others, but the defendant's witnesses are as necessary on the issues found against him as on the issues found for him, the plaintiff will be entitled to the costs of all his witnesses upon the issues found for him, and the defendant to none of his. *Richards v. Cohen*, 533

50. Where an appeal against a poor rate is entered, and the appellant does not appear to support his appeal, the Sessions still have power to hear the appeal, and make an order for the respondent's costs upon the appellant. *The King v. The Justices of Essex*, 539

51. The general issue, pleaded to a declaration containing several counts, tenders a distinct issue on each count; the defendant therefore is entitled, under 1 Reg. Gen. H. T. 2 Will. 4, s. 74, to the costs of the counts found for him. The above general rule of H. T. applies to all taxations after the commencement of *Easter Term*. *Cox v. Thomason*, 572

52. The Court will allow reasonable costs of serving a notice of taxation. *Thorp v. Wordy*, 575

53. The defendant is not entitled to treble costs under the Highway Act, 13 Geo. 3, c. 78, s. 81, where a verdict is given for him. *Ward v. Bateman*, 620

54. Where some defendants demurred to some of the counts of a declaration, and the other defendants went to issue upon them, and all the defendants went to issue upon the other counts, and those defendants who demurred got judgment upon the demurrer before the issues were tried:—*Held*, that they were not entitled to have their costs taxed upon that judgment, under the 8 & 9 Will. 3, c. 11. *Forbes v. Gregory*, 679

55. If the general issue is pleaded to a declaration containing several counts, and the plaintiff obtains a verdict on one, and the defendant a ver-

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dict on the rest, the latter is entitled to have the costs of the counts found for him deducted from those of the counts found against him, under 1 *Reg. Gen. H. T. 2 Will. 4, s. 74. Knight v. Brown,* 730

COURT OF REQUESTS.

See ATTORNEY, 3, 31.—Costs, 15, 27, 37, 38, 45.—EXECUTION, 5.

1. Jurisdiction is given to the *Bradford* Court of Requests, where the debt demanded does not exceed 5*l.*, which means *rightfully* demanded: and if a plaintiff sues elsewhere, and recovers less than 5*l.*, he will not be entitled to his costs. *Drew v. Coles,* 580

2. The master of a vessel trading between *London* and *Rotterdam*, having no place of business in the city, but occasionally transacting a little business at the quay where his vessel is moored, and having a place of residence in *Southmark*, is not a person seeking his livelihood or having dealings or transactions in *London*, within the meaning of the *London* Court of Requests Acts, 3 *Jac. 1, c. 15*, and 14 *Geo. 2, c. 10*. *Semble*, that an action for use and occupation is not within the 39 & 40 *Geo. 3, c. 104*. *Double v. Gibbs,* 583

3. To take advantage of a Court of Requests Act to deprive the plaintiff of costs, the defendant must bring himself directly and expressly within the words of the act; and, therefore, if he merely swears "that he keeps a counting-house or warehouse," the act only specifying "warehouse," and leaves it doubtful whether he seeks his *whole* livelihood within the limits of the act, he does not shew sufficient to entitle the Court to interfere to deprive the plaintiff of costs. *Newton v. Peacock,* 677

CREDIT.

Unless it is perfectly clear that an

DEMURRER.

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action is brought for goods sold and delivered before the stipulated credit has expired, the Court will not set aside the writ on motion. *Lamb v. Pegg,* 447

CROWN.

If the Crown demises during a term, a declaration in ejectment may be entitled as of the first year of the successor's reign. *Anonymous,* 4

DEBTOR.

See SMALL DEBTOR.

DECLARATION.

See NON PROS., 1, 2.—1 *REG. GEN. H. T. 2 W. 4, p. 187*.

1. The declaration when filed is deemed a good declaration from the time of the notice only; and, therefore, where a defendant entered an appearance after a declaration *de bene esse* was in fact filed, but before notice was given to the defendant, the Court set aside the declaration and subsequent proceedings as being irregular. *Weddle v. Brazier,* 639

2. Since the late act of the 2 *Will. 4, c. 39*, it is unnecessary, in the *Exchequer*, to suggest in the declaration, that the plaintiff is a debtor to the King, or is less able to pay the King's debt. *Hunt v. Pitt,* 659

3. Where one of two defendants was in custody on a criminal charge, the Court allowed him to be brought up, to be charged with a declaration. *Williams v. Smith,* 703

DEMURRER.

A demurrer, though trivial, cannot be treated as a nullity where the defendant is not under terms to plead issuably; but, if he is, he cannot demur specially; and where good grounds are stated, the Court will sometimes allow the special causes of demurrer to be struck out. *Nanny v. Kenrick,* 609

DISTRINGAS.

See UNIFORMITY OF PROCESS ACT, 1.

1. In order to get a *distringas* to compel an appearance, a copy must be left. *Street v. Lord Alvanley*, 638

2. The requisites for moving for a *distringas* on a *venire* according to the old practice, are applicable to the *distringas* given by the New Process Act, and must be complied with before moving for a *distringas*. *Johnson v. Rouse*, 641

3. The eight days which the defendant has to appear in to the writ of summons are to be reckoned from the time of the last attempt which is made to serve him. *Brian v. Stretton*, 642

4. Though the Court will not in general grant a *distringas* except on an affidavit that a copy of the writ has been left at defendant's house, still the mere want of that averment in the affidavit is not sufficient to enable the defendant to move to set aside the *distringas* as being irregular. *Smith v. Macdonald*, 688

5. Under the 2 & 3 Will. 4, c. 39, s. 3, a *distringas* must be issued either to compel an appearance, or for the purpose of outlawry, but not in the alternative. *Fraser v. Case*, 725

ECCLESIASTICAL JURISDICTION.

See PROCTOR, 1.

The punishment for defamation is discretionary in the Ecclesiastical Court. Therefore, where a defendant was sentenced to acknowledge, that he believed the life and conversation of a woman whom he had defamed, to be "sober, chaste, and honest," at the time of doing the penance, the *King's Bench* held, that the Ecclesiastical Court had not exceeded its jurisdiction. *Birch v. Brown*, 395

EJECTMENT.

See MORTGAGOR, 1.

1. It is no objection to a declaration in ejectment, not brought by a landlord against his tenant, that the notice directed by the 11 Geo. 4 & 1 Will. 4, c. 70, s. 36, is subscribed, provided it is served before the essoign day. *Anonymus*, 18

2. Service of a declaration in ejectment, on the book-keeper of a Company in possession of part of the premises—sufficient. *Doe v. Roe*, 23

3. Service in ejectment. *Doe v. Roe*, 67

4. An affidavit of service of a declaration in ejectment upon A. B. and C. D., tenants in possession as executors, is insufficient. *Doe v. Roe*, 295

5. Service of declaration in ejectment. A declaration in ejectment may be served upon the wife of the tenant in possession off the premises, if she is living with her husband at the time. *Doe d. Briggs v. Roe*, 312

6. Where a person has entered an appearance in ejectment, and become a party to the consent rule, but swears he is in possession of no part of the premises in question, the Court will allow his name to be struck out of the appearance and consent rule, on his undertaking to permit execution to issue for any part of the premises of which he may be in possession. *Doe d. Snape v. Snape*, 314

7. What is a sufficient acknowledgment by a tenant in possession, of receiving a declaration in ejectment. *Doe v. Roe*, 365

8. In serving a declaration in ejectment, it will suffice to read it over without explaining it, or to explain it without reading it over. *Doe v. Roe*, 423

9. What is a sufficient service in ejectment. *Doe d. Osbaldiston v. Roe*, 456

10. If two terms elapse after the

service of a declaration in ejectment, the Court will not grant a rule for judgment against the casual ejector on that service. *Doe v. Roe*, 495

11. If the tenant in possession reads over and says he understands the nature and object of a declaration in ejectment, it is not necessary for the person serving it to read it over or explain it. *Doe d. Jones v. Roe*, 518

12. Where a landlord's right accrues during *Hilary* Term, and the premises are situate in the county of *Middlesex*, proceedings cannot be had for their recovery under 11 *Geo. 4* & 1 *Will. 4*, c. 70, s. 36. *Doe d. Norris v. Roe*, 547

13. If an attorney of one Court accept a declaration in an ejectment brought in another, it is no ground for a rule, either absolute or *nisi*, for judgment against the casual ejector. *Doe d. Walker v. Roe*, 569

14. Service of a declaration in ejectment upon the mother of the tenant in possession is not sufficient. *Doe d. Smith v. Roe*, 614

15. Service of declaration in ejectment on a person described as mortgagee in possession, by delivering it to his attorney, who undertook to appear for him, is not sufficient, without an acknowledgment by the mortgagee. *Doe d. Collins v. Roe*, 618

16. Where the tenant was ill, service on the daughter, who read and explained the declaration to her father, was held sufficient. *Doe d. Cockburn v. Roe*, 692

17. Service of declaration in ejectment on the wife at the husband's residence is sufficient, though the husband does not reside on the premises. *Doe d. Wingfeld v. Roe*, 693

See 11 *Reg. Gen. T. T. 1 W. 4*, p. 104.

ELISORS.

See PROCESS, 3.

ERROR.

See 1 *REG. GEN. H. T. 2 W. 4*, p. 194.—VARIANCE, 9, 10.

1. If a writ of error be sued out for the mere purpose of delay, and the bail put in thereon are men of straw, the plaintiff may, notwithstanding, issue execution. *Fuller v. Coombe*, 207

2. A person who is plaintiff both below and above, need not give bail in error. *Duvergier v. Fellowes*, 224

3. On a writ of error on a judgment of nonsuit, although the allowance has been served, the Court will not stay execution, unless the plaintiff points out some real error in the judgment; and the 11 *Geo. 4* & 1 *Will. 4*, c. 70, s. 8, makes no variation in the practice on this point. *Keeling v. Austin*, 228

4. The Court will not give leave to a defendant to *nonpros* his own writ of error, except on payment of costs. *Wilkinson v. Malin*, 628

ESTREATS.

Clerks of the peace, &c. may verify their returns of estreats, &c. to this Court by affidavit, without a commission or personal appearance, where the amount is under 5*l*. *Ex parte Tomlins*, 303

EXECUTION.

See 1 *REG. GEN. H. T. 2 W. 4*, pp. 193, 196.

1. If judgment is obtained against a defendant in custody on mesne process, the plaintiff in the action may issue execution against the goods without discharging him. *Jones v. Tye*, 181

2. If money is deposited in Court in lieu of bail above, pursuant to the 7 & 8 *Geo. 4*, c. 71, and the plaintiff obtains a verdict, he must limit his execution to the surplus of his demand beyond the sum deposited. *Hems v. Pyke*, 322

3. Where a defendant has rendered in discharge of bail after trial, and the plaintiff has not charged him in execution within two terms after the trial, the defendant may be superseded, and cannot afterwards be taken on a *ca. sa.* issued on a judgment subsequently signed. *Brown v. Gardner*, 426

4. If, while a *ca. sa.* at the suit of a plaintiff is lying in the hands of the sheriff, the defendant is illegally taken into custody at the suit of another person, the *ca. sa.* attaches, and the sheriff cannot discharge the defendant. *Arundel v. Chitty*, 499

5. Where a Judge at the assizes, in pursuance of the provisions of the 1 *Will.* 4, c. 7, orders that the plaintiff shall have execution within a limited time, and judgment is thereupon entered up and execution issued, the defendant is not precluded from applying in the next term to the Court above, to enter a suggestion to deprive the plaintiff of costs. *Baddley v. Oliver*, 598

A Judge at the assizes has no power to order such a suggestion to be entered. *Ibid.*

It is the sum which the plaintiff ultimately recovers, and not the sum which the plaintiff claims to be due, which is to decide whether the plaintiff ought to have sued in the court of conscience, or in the superior Court. *Ibid.*

6. Where two parties come to an arrangement, and one is ignorant of his rights, the agreement is not in general binding upon him. *Ibid.*

FEME COVERT.

See COSTS, 12.—HUSBAND AND WIFE, 1.

1. Where a married woman has held herself out as a widow, and by that means obtained credit, and she is afterwards arrested, the Court will

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not relieve her summarily. *Hall v. Barber*, 8

2. If a married woman represents herself as single, and by that means obtains credit, if arrested, she is not entitled to her discharge on motion. *Simon v. Winnington*, 16

3. Where a plaintiff knows that a defendant is married at the time of arresting her, although she may have represented herself as possessing separate property, the Court will discharge her on motion. *Slater v. Mills*, 250

FINE.

1. The affidavit of acknowledgment of a fine was taken in *Jamaica* on paper, and, in the margin of the affidavit of the caption, it was certified that no parchment could be procured there; the Court permitted the fine to pass, on the officer's engrossing a copy of the affidavit on parchment, and annexing it to the paper writing. *King, plaintiff; Gibson, Farmer, and Others, deforciant*, 236

2. Where one of the commissioners for taking the caption of a fine in *Scotland* was only an attorney of a *Scotch* Court, the fine was not allowed to pass. *Anonymous*, 240

3. Where one of the commissioners had omitted to indorse his name on the *dedimus*, the Court notwithstanding allowed the fine to pass. *Markham, plaintiff; Bayley, deforciant*, 241

4. The Court allowed a fine to be amended, by inserting land in a parish not named in the deed, it appearing from the description of the property in the deed, that it was the intention of the parties to pass such land, and it being necessary to make up the quantities stated therein. *Anonymous*, 255

5. Where a fine may be allowed to pass without an affidavit on parchment. *Wickham, demandant; Foreman and Wife, deforciant*, 707

HUSBAND AND WIFE.

FRAUD.

The terms of a written undertaking cannot be varied by parol unless there is fraud. *Hills v. Warner*, 680

HABEAS CORPUS.

Where a plaint has been entered in the Lord Mayor's Court against two defendants, and one only has been arrested, the cause cannot be removed into the *King's Bench*, without bail being put in for both defendants. *Jamason v. Schonswar*, 175

Semble—That the affidavits in support of the rule for a *procedendo* in such a case should not be intitled in the cause in the inferior Court, but "in the *King's Bench*" only. *Ibid.*

HANDWRITING (PROOF OF, COSTS OF).

See 7 REG. GEN. H. T. 2 W. 4, p. 199.

HIGHWAYS.

Where a surveyor of the highways has improperly allowed the time for producing and passing his accounts to elapse, the Court will compel him to produce them by *mandamus*. *Rex v. Lewis*, 530

HUSBAND AND WIFE.

See Costs, 12.—FEME COVERT.

In an action against husband and wife, for a debt incurred by the wife *dam sola*, the Court refused, at the instance of the husband, to set aside an appearance entered for both, it appearing that the wife had given instructions to the attorney. *Williams v. Smith*, 632

If an attorney appears for one without authority, and he applies quickly to the Court—*semble*, that the Court will interpose to protect him. *Ibid.*

INDORSEMENT. 755

IMPARLANCE.

See 7 REG. GEN. T. T. 1 W. 4, p. 104; 1 REG. GEN. H. T. 2 W. 4, p. 198.—WAIVER, 7.

1. Rule 7 of *Reg. Gen. T. T. 1 Will. 4*, as to imparlances, only applies to cases in which the writ, appearance, and declaration, are of the same term. *Edensor v. Hoffman*, 304

If the defendant is entitled to an imparlance and takes out a summons for time to plead, which is indorsed by consent, he waives the imparlance, and the plaintiff may sign judgment for want of a plea, before the enlarged time for pleading has expired, if no order be drawn up. *Ibid.*

2. Where a plaintiff declares on or before the last day of any term, the defendant is not deprived of his imparlance by *Reg. Gen. 7, T. T. 1 Will. 4*, unless the process is returnable in the same term. *Thomson v. Smith*, 281

3. Where the writ and declaration are of different terms, the defendant is entitled to an imparlance. An irregularity is not waived by agreeing to terms where the party is under a misapprehension, occasioned by the mistake of a Judge in point of law. *Whalley v. Barnett*, 607

INDORSEMENT (OF PROCESS).

1. The sheriff is not bound to execute bailable process on which the place of abode and addition of the defendant are not indorsed, although, at the time of receiving the process, he made no objection to the want of indorsement. *Kenrick v. Nanney*, 58

2. 2 *Reg. Gen. H. T. 2 Will. 4*, as to the indorsement on process of the amount of debt and costs demanded by plaintiffs, is not directory but compulsory. *Ryley v. Boissomas*, 383

3. The Court will not set aside process, on account of the amount of debt and costs not being indorsed upon it, according to 2 *Reg. Gen. H. T. 2 Will.*

4, unless it appears on affidavit that the cause of action was a debt. *Curwin v. Moseley*, 432

4. The 2 Will. 4, c. 39, s. 12, which requires every writ to bear date on the day it issues, is not satisfied by a day being indorsed on the writ. *Anonymous*, 654

Where there is an objection in point of form, which applies as well to the writ as the copy, the defendant cannot move to set aside the service of the writ only, but he must move to set aside both writ and copy. There must be some irregularity in the service to warrant a motion to set aside the service only. *Ibid.*

INFORMALITY.

An inconsistency in the body of a bill of *Middlesex* may be cured by the notice at the foot of the writ. *Willean v. Collins*, 35

INJUNCTION.

See SHERIFF, 2.

Where an action is brought against executors who are restrained by an injunction from disposing of their testator's effects, and they resist the claim, the Court will not stay proceedings, although, if a judgment had been signed, it might stay execution. *Davis v. Salter*, 561

INQUIRY (WRIT OF).

The defendant is entitled to have the inquisition, on a writ of inquiry being executed, filed, for the purpose of taking any objection to arrest or vacate the judgment: and the plaintiff's attorney having refused to file it, or to shew it to the defendant's attorney, the Court ordered the plaintiff's attorney to pay the costs. *Townsend v. Burns*, 629

INSOLVENT.

The 7 Geo. 4, c. 57, the Insolvent Act, only applies to rent due at the

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time of the insolvent obtaining his discharge. *Brookes v. Hutchinson*, 493

INSPECTION (OF COURT ROLLS).

See 1 REG. GEN. H. T. 2 W. 4, p. 197.

INSPECTION OF DEEDS.

1. Where a deed has been produced and read on a trial by one party, the Court will oblige him to permit the other party to inspect that deed, in case of a new trial. *Hewitt v. Pigott*, 219

2. If one part of a document has been lost, the party holding the other part, or his attorney if he holds it, may be compelled to produce it at the Stamp Office, to be stamped, though not held on any trust for the party applying. *Neale v. Swind*, 314

INTEREST.

In an action on a security bearing interest, the defendant cannot support his plea of *solvit ad diem* by proof of payment of a sum into Court sufficient to cover the amount of the plaintiff's demand, with interest down to the time of action brought. He should pay in sufficient to cover the amount of interest due at the time of making the payment into Court. *Kidd v. Walker*, 331

INTERPLEADER.

1. The sheriff is not entitled to his costs on applications under the 1 & 2 Will. 4, c. 58, s. 6; and his claim to poundage depends on the legality of the seizure. *Barker v. Dynes*, 169

2. The Court will relieve the sheriff under the 1 & 2 Will. 4, c. 58, s. 6, in the case of conflicting claims on property seized by him, though one claim is only of a lien, and not of the whole property. *Ford v. Baynton*, 357

3. Where the sheriff has levied under a *fi. fa.*, and, while in possession,

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he receives notice that other writs of execution have been issued against the defendant's goods, and that the first execution creditor is not entitled to the whole proceeds of the levy, the sheriff is not entitled to relief under the 1 & 2 Will. 4, c. 58, s. 6. *Salmon v. James*, 369

4. Where an adverse claim is set up to goods seized by the sheriff, and the latter applies to the Court for relief under the 1 & 2 Will. 4, c. 58, s. 6, and the adverse party does not appear to support his claim, the Court will bar his claim as to the sheriff, and make him pay the judgment creditor his costs of appearing on the sheriff's rule, but will not allow the sheriff his costs. *Bowdler v. Smith*, 417

5. Where a *fi. fa.* has issued, goods seized under it, an adverse claim set up, the sheriff has applied for relief under the Interpleader Act, and the execution creditor does not appear to support his *fi. fa.*, the Court will grant the costs of the adverse claimant's appearing to support his claim, to be paid by the execution creditor, but not those of the sheriff: yet, if the execution creditor afterwards appears and opens the rule, the Court will grant the sheriff the costs of his second appearance. *Bryant v. Ikey*, 428

6. The 1 & 2 Will. 4, c. 58, does not apply to claims in equity. *Sturgess v. Claude*, 505

7. Where the sheriff applies to the Court for relief under the 1 & 2 Will. 4, c. 58, s. 6, the Interpleader Act, and no blame appears to attach either to the execution creditor, the claimant, or the sheriff, each party will pay his own costs. *Morland v. Chitty*, 520

8. Where a sheriff seizes under a *fi. fa.*, and the question is, whether that writ ought to have precedence of another, the Court will not grant the sheriff relief under the 1 & 2 Will. 4, c. 58, s. 6. *Day v. Waldock, Lawrence v. Same*, 523

9. Where a sheriff is relieved un-

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der the 1 & 2 Will. 4, c. 58, s. 6, and an issue is directed to try the rights of adverse claimants, the Court may adjudicate after the trial on the costs of appearing to the sheriff's rule and of the issue. *Seaward v. Williams*, 528

10. A sheriff will not be entitled to relief under the 1 & 2 Will. 4, c. 58, s. 6, unless he comes in the first instance, on receiving notice of an adverse claim. *Devereux v. John*, 548

11. Where a sheriff has obtained a rule under the Interpleader Act, and the execution creditor does not appear, the Court will permit the sheriff to withdraw from possession, but will not grant him his costs of keeping possession after notice of an adverse claim. *Field v. Cope*, 567

12. The sheriff is not entitled to relief under the Interpleader Act, if he pays over the money to the execution creditor after notice of a claim by a third party. *Anderson v. Calloway*, 636

13. A defendant, who is sued for the recovery of property in his possession, in which he has no interest, but which is claimed by a third person, cannot apply to be relieved under the Interpleader Act against the claims of the plaintiff and such third party, if he has an indemnity from the claimant. *Tucker v. Morris*, 639

14. Where money has been paid into Court by a stakeholder, to abide the event of a feigned issue, under 1 & 2 Will. 4, c. 58, the parties succeeding cannot take out the money before judgment signed. *Cooper v. Lead Smelting Company*, 728

INTERROGATORIES.

1. On an application under the 1 Will. 4, c. 22, s. 4, to have a witness, within the jurisdiction of the Court, examined on interrogatories, the name of the person before whom the examination is to take place must be

mentioned, before the rule *nisi* will be granted. *Doe d. Thorn v. Phillips*, 56

2. Where a defendant at his own expense obtained a writ of *mandamus* under 13 *Geo. 3*, c. 33, s. 44, for examining witnesses in *India*:—*Held*, that the plaintiff was entitled to copies of the depositions returned on paying the expense of making such copies, although he refused to pay any part of the expenses attending the writ. *Davidson v. Nicol*, 220

3. In certain cases, the Court will grant a rule absolute, unless cause be shewn on the morrow for the examination of witnesses by the Prothonotary, under the 1 *Will. 4*, c. 22, s. 4. *Pirie v. Iron*, 252

4. Before the Court will permit a witness to be examined before the Prothonotary, under the 1 *Will. 4*, c. 22, s. 4, on the ground of anticipated illness, it must appear, that there is strong reason to believe that the illness will exist at the time of trial. *Abraham v. Norton*, 266

5. The Courts at *Westminster* have power under the 1 *Will. 4*, c. 22, s. 4, to issue commissions for the examination of witnesses, although not resident in the King's dominions. *Duckett v. Williams*, 291

6. The 1 *Will. 4*, c. 22, s. 4, which gives power to the Court to issue commissions in certain cases for the examination of witnesses, does not apply to indictments. *The King v. Lady Briscoe*, 520

IRREGULARITY.

See 1 REG. GEN. H. T. 2 W. 4, p. 187.

JUDGE'S POWER.

See COSTS, 4, 20.—EXECUTION, 5.—PLEA, 5.—9 REG. GEN. T. T. 1 W. 4, p. 104.

JUDGE'S ORDER.

See PLEA, 5.—TRUSTEES.

An attachment will not lie for dis-

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obedience to a Judge's order until it is made a rule of Court, though the order has been acquiesced in, and acted upon. *Baker v. Rye*, 689

JUDGMENT (ARREST OF).

See 1 REG. GEN. H. T. 2 W. 4, p. 191.

A Judge at chambers, having, in an action of *assumpsit*, ordered a sham demurrer to be set aside and judgment signed, under which final judgment was signed without an interlocutory judgment, and the debt and costs levied, the Court set aside that order. *Foster v. Burton*, 683

JUDGMENT AS IN CASE OF A NONSUIT.

See 1 REG. GEN. H. T. 2 W. 4, p. 192.

1. Where a plaintiff gives notice of trial sooner than he need, he is bound to proceed to trial pursuant to the notice, or the defendant may move for judgment as in case of a nonsuit in the following term. *Howell v. Powlett*, 263

2. If issue is joined in an issuable term in a country cause, and no notice of trial given for the ensuing assizes, the defendant cannot move for judgment as in case of a nonsuit until the term next after the second assizes. *Simonds v. Folkenham*, 292

3. It is not sufficient, in applying for judgment as in case of a nonsuit, to state that the plaintiff replied, and that the cause is *thereby* at issue, but it must be sworn without qualification that the cause is at issue. *Smyth v. Parslow*, 308

4. Where issue has been joined in one term, and no notice of trial, the defendant cannot move for a judgment as in case of a nonsuit in the next term, notwithstanding the rule 70, *H. T. 2 Will. 4*. *Gates v. Terry*, 370

5. Where the plaintiff has taken a cause down to the assizes, and it is made a *remanet*, the defendant is not

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entitled to judgment as in case of a nonsuit. *Brown v. Rudd*, 371

6. Though the rules of *Hilary* Term, 2 *Will.* 4, did not come into operation until the first day of *Easter* Term, 2 *Will.* 4, it is irregular to move for judgment as in case of a nonsuit after a motion for costs of the day for not proceeding to trial, for the same default under the 69th rule of the first division of rules of *Hilary* Term. *Omarion v. Snelling*, 373

7. Under rule 69 of the first division of rules of *H. T.* 2 *Will.* 4, a default in not proceeding to trial pursuant to notice, cannot be connected with a default in not giving notice of trial, so as to prevent the defendant from moving for judgment as in case of a nonsuit after a motion for costs of the day. *Hyde v. Gardner*, 380

8. Rule 69 of 1 *Reg. Gen. H. T.* 2 *Will.* 4, does not enable the Court, where a rule for judgment as in case of a nonsuit for not proceeding to trial is made absolute, to grant the defendant the costs of the day, on disposing of that motion. *Johnson v. Smith*, 421

9. Where a default in proceeding to trial is made by a plaintiff, but the defendant does not move for judgment as in case of a nonsuit until after fresh notice of trial, he is still entitled to his judgment. In all cases of peremptory undertaking, though the cause may be in the paper, a fresh notice of trial must be given. *Bainbridge v. Purvis*, 444

10. Giving notice that a cause will be taken as undefended at the Sittings in *London*, and appearing for the purpose of trying the cause as undefended, is not a sufficient taking the cause down to trial, to prevent the defendant from obtaining judgment as in case of a nonsuit. *Edrupp v. Davies*, 552

11. An agreement by a defendant to take no notice of trial is not equivalent to a notice of trial, so as to en-

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title the defendant to judgment as in case of a nonsuit for not proceeding to trial. *Downes v. Cross*, 561

12. Where the Court discharges a rule for judgment as in case of a nonsuit, it will make an order for the payment of the costs of the day, but not as a condition of discharging the rule. *Lenniker v. Barr*, 503

JURY.

See 1 *REG. GEN. H. T.* 2 *W.* 4, p. 197.

1. One of the jury having absconded before the verdict was delivered, and the plaintiff refusing to take a verdict from the eleven, a new trial was had, and the plaintiff obtained a verdict:—*Held*, he was entitled to the costs of both trials. *Harrison v. Bennett*, 627

2. The costs of a good jury on the execution of a writ of inquiry are in the discretion of the Court. *Wilkinson v. Malin*, 630

LACHES.

See PRIVILEGE FROM ARREST, 1.—
SCIRE FACIAS, 6.—VARIANCE, 3.—
WAIVER, 3, 4.

LANDLORD AND TENANT.

See EJECTMENT, 12.

1. In an ejectment by landlord against tenant, if the title to the premises be disputed between them, the latter is not compellable to give the undertaking and enter into the recognizance required by 1 *Geo.* 4, c. 87, s. 1. *Doe d. Sanders v. Roe*, 4

2. Where the sheriff executes a *fi. fa.*, and he receives notice of a year's rent being due, and the goods on the premises are not sufficient to satisfy a year's rent, he must withdraw; and, if he sells, the Court will not stay proceedings in an action against him on the 8 *Ann.* c. 14, s. 1, on paying over the proceeds of the sale. *Foster v. Hilton*, 35

3. Where a landlord's right of possession accrues on the essoign day of *Trinity Term*, he is not entitled to serve a declaration in ejectment as of that term, under 11 *Geo. 4 & 1 Will. 4*, c. 70, s. 36. *Doe v. Roe*, 79

4. The 1 *Geo. 4*, c. 87, requiring tenants holding over to give security and enter into recognizance, only applies to cases where the tenancy is under lease, and has expired by effluxion of time; or under an agreement from year to year, if the tenancy has been determined by a regular notice to quit. *Doe d. Sir Nicolas Conyngham Tindal v. Roe*, 143

5. Where a lease is in the hands of a tenant, and it appears that no counterpart can be found, the Court will permit the landlord to inspect and take a copy of the lease. *Doe d. — v. Slight*, 163

6. Where a defendant in ejectment has given the undertaking, and entered into the recognizances required by 1 *Geo. 4*, c. 87, s. 1, and a verdict is found against him, he cannot, under s. 3 of that act, bring a writ of error without giving two additional sureties. *Doe d. Durant v. Moore*, 203

7. The 11 *Geo. 4 & 1 Will. 4*, c. 70, s. 36, which affords certain facilities to landlords in recovering possession of premises, to which their title has accrued, does not apply to cases in which the title accrues in *Michaelmas* or *Easter Term*. *Doe v. Roe*, 304

8. The Court will not make an order to hold a tenant to bail under 11 *Geo. 2*, c. 19, s. 3, for double the amount of goods clandestinely and fraudulently removed from premises on which arrears of rent have accrued. *Sutton v. Osmald*, 348

LIBEL.

1. A count in an action for libel charging that the defendant wrote of the plaintiff that he was a "man *Friday*" to another, was held bad, for want of an averment to shew, that, by

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the term *Friday*, as applied to the plaintiff, degradation and subserviency were intended to be imputed to him. *Forbes v. King*, 672

2. To write of a man that he has been engaged in a gambling fracas arising out of a dispute at play, is not libellous, without an averment that *illegal* gambling and play were intended by the libel. *Ibid.*

LIFE (PROOF OF).

See WARRANT OF ATTORNEY, 6.

LORDS' ACT.

1. A motion to bring up a prisoner, under the compulsory clauses of the Lords' Act, cannot be granted so late as the seventh day "of the term, &c." *Acraman v. Harrison*, 254

2. Where a prisoner has petitioned for his discharge under the Insolvent Act, and the Insolvent Court has not decided on the merits of his petition, the Court will not compel him to assign under the compulsory clauses of the Lords' Act. *Evans v. James*, 260

3. Where a prisoner, brought up under the compulsory clauses of the Lords' Act, is not prepared with her schedule, and she refuses to claim her sixty days, the Court is bound to allow them to her. *Price v. Davidson*, 496

MANDAMUS.

See CERTIORARI, 3.—HIGHWAYS, 1.
—PARISH ACCOUNTS, 1.

1. Where the Quarter Sessions have confirmed an order of removal, subject to a case for the opinion of the Court of *King's Bench*, and the Justices cannot agree for several sessions on the terms of the case, this Court will grant a *mandamus*, commanding them to enter continuances and hear the appeal; for the order of Sessions being only conditional, there is no decision unless the case is returned. *Rex v. The Justices of Suffolk*, 163

2. Where a rule *nisi* for a manda-

mus to justices to hear an appeal is discharged with costs to be paid to the justices by the appellants, the parish which appeared to support the refusal of the justices is not entitled to its costs, although served with the rule *nisi*, and although the justices did not appear by counsel. *Rex v. The Justices of Staffordshire*, 507

MARSHAL.

1. Where a defendant escapes from the custody of the marshal, the latter, if served with the common side-bar-rule, "to bring the defendant into Court," &c., must give notice of the escape to the plaintiff's attorney within the time limited by the rule. *White v. Stratton*, 550

MERITS.

1. In order to set aside a regular judgment, on payment of costs, the affidavit must state that the defendant has "a good defence upon the merits." It is insufficient to state, that he has "a good and meritorious defence." *Bower v. Kemp*, 282

2. The Court will not set aside proceedings against the sheriff, on an affidavit of merits made by an attorney, which only states that he believes that the defendant has a good defence to the action. *Roe v. The Sheriff of Middlesex*, 398

3. Whilst a cause stood in the paper for trial, the plaintiff having obtained an order to amend, (which was, in fact, unnecessary), the defendant took out a summons to rescind that order for irregularity, and an order to that effect was obtained; whilst the second order was in discussion at chambers, the cause was tried, and the plaintiff obtained a verdict: the Court refused to grant a new trial, without an affidavit of merits. *Clark v. Manns*, 656

4. It is not sufficient for a defendant, on moving to set aside proceedings on a bail bond, to swear that the

defendant in the original action has a good defence, even though he be an infant: he must swear to merits. *Hallett v. Aubrey*, 688

MISNOMER.

See 1 REG. GEN. H. T. 2 W. 4, p. 187.

1. If a defendant having two Christian names, is arrested on process describing him by one at full length and the initial of the other, it is a ground for cancelling the bail bond. *Ogden v. Barker*, 125

2. Where a person named *Wm. Hamilton M.* was arrested by the name of *Wm. Henry M.*, and he had signed an agreement with the initial letters *W. H.*, and he had once told the plaintiff that his name was *Wm. Henry M.*, the Court would not discharge him on motion. *Newton v. Maxwell*, 315

MORTGAGOR.

1. In an ejectment on a forfeiture in not paying mortgage money, the defendant is entitled to have proceedings staid under the 7 Geo. 2, c. 20, upon payment of the principal and interest due on the mortgage deed, with the costs incurred at law and in equity, without paying any by-gone interest, or the expense of preparing the mortgage deed, or any assignment of it. *Doe d. Blagg v. Steel*, 359

NEW TRIAL.

See 1 REG. GEN. H. T. 2 W. 4, p. 191.—VENUE, 1.

1. If a cause be tried at the sittings in term, a new trial may be moved for at any time within four days after the return of the *distringas*, although more than four days have elapsed since the trial. *Mason v. Clarke*, 288

2. A motion to set aside a rule for a new trial cannot be made after the lapse of four terms, without a term's notice. *Deacon v. Fuller*, 675

Obtaining an order for changing

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the attorney is not such a step as will prevent the necessity of such a notice. *Ibid.*

Semble, that such a motion cannot be made. *Ibid.*

3. Where a party is entitled to move for a new trial as a matter of right, the Court cannot limit the inquiry to one particular point, but must grant it generally. *Mahoney v. Fraser*, 703

NON PROS.

See ERROR, 4.—PARTICULARS, 2.—8
REG. GEN. T. T. 1 W. 4, p. 104.

1. The word "peremptorily" in a rule to declare, will only prevent a plaintiff from taking out more rules for time to declare; and therefore, if the defendant signs judgment of *non pros.* after the rule to declare has run out, but the plaintiff has declared, the judgment is wrong. *Gray v. Pennell*, 120

2. If a demand of declaration has been served, and time to declare has been obtained, the defendant may sign judgment of *non pros.* without a fresh demand of declaration. *Wells v. Hare*, 366

NOTICE.

See 1 REG. GEN. H. T. 2 W. 4, p. 189.—SMALL DEBTOR, 5, 7, 8, 9.

NOTICE OF MOTION.

See PEREMPTORY UNDERTAKING, 1.

1. Where a rule *nisi* is obtained for setting aside proceedings for irregularity, there can be no stay of proceedings, unless notice of the motion has been given to the opposite party. *Fortescue v. Jones*, 524

NOTICE OF TRIAL.

See 1 REG. GEN. H. T. 2 W. 4, p. 190.

1. A notice of trial at "*Guildhall, Westminster*," the Court of *King's Bench* not sitting there, is defective, if the defendant swears that he was misled by it. *Cross v. Lang*, 342

2. A request by a defendant, that a

PARISH ACCOUNTS.

notice of trial may be put through his door, is no waiver of a personal service of notice of trial. *Fry v. Mann*, 419

3. A defendant, who is under terms to take short notice of trial, is notwithstanding entitled to full notice of countermand; and; therefore, where a defendant so circumstanced did not receive the usual notice of countermand, he was held to be entitled to the costs of the day, his rule for judgment as in case of a nonsuit being discharged on a peremptory undertaking. *King v. Jones*, 640

NULLITY.

See PLEA, 3, 4, 5.—VARIANCE, 11.—
WAIVER, 2.

OUTLAWRY.

See 1 REG. GEN. H. T. 2 W. 4, p. 196.

The Court will not set aside an outlawry, merely on the ground of the defendant having constantly appeared in public during the proceedings against him. *Johnson v. Driver*, 127

Semble, that the Court would set it aside, if it appeared that the party had no notice of them. *Ibid.*

PARENT AND CHILD.

1. The Court will remove a child from the custody of the mother to that of the father, although there is no suggestion that the child is subjected to any improper confinement or restraint, nothing being shewn to prove that the custody of the father is improper. *Ex parte McClellan*, 81

PARISH ACCOUNTS.

1. Where a local statute confers a power of investigating accounts upon auditors to be annually elected, and to be summoned by the vestry clerk, at certain stated intervals, to audit the accounts, the Court will not grant a *mandamus* to compel the latter, when new auditors have been elected for the succeeding year, to call a meeting

of the old auditors to audit the accounts of the last year. *In re St. Giles's and St. George's Parishes*, 540

PARTICULARS.

See COSTS, 28.—6 REG. GEN. T. T. 1 W. 4, p. 103; 1 REG. GEN. H. T. 2 W. 4, p. 189.

1. The rule of *T. T. 1 Will. 4*, requiring the particular of the demand to be annexed to the record, dispenses with the proof of its delivery. *MacCarthy v. Smith*, 253

2. A judgment of *non pros.* signed by the defendant for the non-delivery of particulars pursuant to a Judge's order, is irregular. *Sutton v. Clarke*, 259

3. Where a plaintiff claims, by his particulars annexed to the record, more than is stated in his particulars delivered, and the plaintiff obtains a verdict, the Court will not direct a nonsuit to be entered, unless the defendant was in a condition to make the objection at the time of the trial; and the point was reserved. *Morgan v. Harris*, 570

PAUPER.

See 1 REG. GEN. H. T. 2 W. 4, p. 198.

1. To an indictment in the *King's Bench*, a defendant will be allowed to plead *in forma pauperis*, on making an affidavit that he is not worth 5*l.*, &c. *Rex v. Page*, 507

2. The Court will not allow a party to prosecute in the *King's Bench* *in forma pauperis* on the common affidavit of poverty: but special grounds must be laid for such an application. *Rex v. Wilkins*, 536

PAYMENT INTO COURT.

See BAIL, 13, 29.—EXECUTION, 2.—INTEREST, 1.—1 REG. GEN. H. T. 2 W. 4, pp. 189, 197.—TENDER, 1.

1. If the defendant obtains a new trial, on the ground of the absence of a material witness, upon the terms of

the defendant's paying into Court the amount of the verdict, the Court will not allow the defendant to take that money out; on the ground of certain proceedings in Chancery probably affording a good defence to the action. *Jackson v. Hopkinson*, 227

2. Where money had been paid into Court, and it was doubtful whether the plaintiff, if he took it out, would be entitled to his costs, and the defendant offered to give him judgment of the term, in order to take the opinion of the Court, and the plaintiff proceeded and obtained a verdict for only a shilling, the Court set aside the verdict and compelled him to pay the defendant's costs from the time of the defendant's offer. *Jones v. Owen*, 565

PEER.

See ARREST, 8.—PRIVILEGE FROM ARREST, 2.—RECOVERY, 4.—SERVICE OF PROCESS, 2.

PENAL ACTION (COMPOUNDING).

See 1 REG. GEN. H. T. 2 W. 4, p. 197.

PEREMPTORY UNDERTAKING.

See JUDGMENT AS IN CASE OF A NON-SUIT, 9.

In all cases of peremptory undertaking to try, a fresh notice of trial should be given, though the cause remains in the paper. *Sulsh v. Cranbrook*, 148

PLEA.

See AFFIDAVIT OF DEBT, 17.—COSTS, 30.—PLEADING, TIME FOR, 4.—PUIS DARREIN CONTINUANCE, 1.—VARIANCE, 11.—13 REG. GEN. T. T. 1 W. 4, p. 105; 1 REG. GEN. H. T. 2 W. 4, pp. 188, 196-7.

1. A demand of plea cannot be served on a defendant not an attorney, by sticking it up in the *King's Bench* office. *Anonymous*, 68

2. Where a defendant has pleaded not guilty in an action for an assault, and a verdict has been found for the plaintiff, and a new trial has been granted, on the ground of excessive damages, the Court will not allow the defendant to substitute the plea of accord and satisfaction for that of not guilty. *Price v. Severne*, 215

3. If the affidavit of verification to a plea in abatement be sworn before the declaration is delivered, the plaintiff may treat the plea as a nullity. *Bower v. Kemp*, 281

4. A plaintiff is not entitled to treat a plea as a nullity, which will be rendered a good plea by rejecting surplusage. *Risdale v. Kelly*, 285

5. To a declaration on a bill of exchange, indorsee against acceptor, the defendant pleaded, that the bill was accepted by him in blank and afterwards filled up, and that he had received no consideration for the acceptance, and the plaintiff was aware of these facts. A Judge at Chambers having in vacation, upon an affidavit of the falsity of the plea, ordered that the plaintiff should be at liberty to sign judgment, the plea appearing to be bad for duplicity, the Court of *Exchequer* set aside that order. *Miley v. Walls*, 648

Where a defendant pleaded a plea containing a number of facts, and calculated to perplex the plaintiff, the Court, on an affidavit of its falsity, and no pretence being shewn for pleading it, ordered it to be set aside. *Ibid.*

6. Where *nil debet* and several special pleas were pleaded to debt on a foreign judgment, *nil debet* was ordered to be struck out. *Aliven v. Furnival*, 690

PLEADING.

See REG. GEN. T. T. 1 W. 4, p. 107.

PLEADING (TIME FOR).

See PAUPER, 1.—VENUE, 3.

1. Where an order for particulars

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and an order for time to plead have been obtained, the time for pleading will run, although no particulars are given, unless it is expressed in the order for time to plead, that it is not to begin to run till after the delivery of particulars. *Adams v. Drummond*, 99

2. After a judgment of *respondeat ouster*, a defendant is entitled to four days' time for pleading. *Cantwell v. The Earl of Stirling*, 265

3. In an information by the Attorney-General, a defendant may plead in person. *The Attorney-General v. Carpenter*, 285

4. If a defendant pleads irregularly, the plaintiff is not therefore entitled to sign judgment before the time for pleading is out. *Nolleken v. Severn*, 320

PONE.

Where a *pone* has issued for the purpose of removing a plaint out of the county court, and the sheriff has notwithstanding proceeded with the plaint, the defendant, in order to obtain an attachment against the sheriff, must shew that the recognizances required by the 19 *Geo. 3*, c. 70, s. 6, have been entered into by him. The sheriff's return to the *pone*, "I could not execute this writ, the cause therein alleged for the execution thereof not being true," is bad. *Grimshaw v. Emerson*, 337

POOR'S RATES.

The Court will not grant a *certiorari* to remove a warrant of distress to levy poor's rates. *Ex parte Taunton*, 54

PRIVILEGE FROM ARREST.

See ARREST, 1, 5, 7, 8, 10.—ATTORNEY, 12.

1. Although an ambassador's servant may be privileged as to his person, it does not follow that all his goods are privileged also, so as to en-

able the sheriff to apply to set aside a *fi. fa.* issued against them: and a clear case of privilege must be made out to the satisfaction of the Court, or else they will not interfere either on behalf of the sheriff or the person privileged. *Quære*, whether a chorister, who merely officiates at a chapel where a foreign ambassador attends divine service, is privileged as being the servant of an ambassador. *Fisher v. Begrez*; 588

When application is to be made for relief or indulgence, it ought to be made without delay. *Ibid.*

2. The defendant pleaded peerage, and judgment of *respondeat ouster* was given on that plea; a verdict afterwards passed for the plaintiff, and a *ca. sa.* issued against the defendant; the Court refused to set aside this writ on an affidavit of peerage. *Digby v. Alexander*, 713

PROCESS.

1. In a county palatine the defendant should be served with the *latitat*, and not with the mandate of the Chancellor. *Griffin v. Higgin*, 45

2. Serviceable process may be directed to a sheriff who is a party in a cause. *The Mayor, &c. of Kingston-upon-Hull v. Bubb*, 151

3. Where the sheriff and coroners are members of a corporate body, who sue in that character, the Court will direct the prothonotary to name and appoint elisors, to whom the process may be directed; and the rule is absolute in the first instance. *The Mayor, &c. of Norwich v. Gill*, 246

4. The motion under 1 *Reg. Gen. H. T. 2 Will. 4*, s. 49, that sticking up a notice of action in the office may be deemed good service where the defendant's residence is unknown, is absolute in the first instance. *Bridger v. Austin*, 272

5. If a *latitat* be served in a wrong county, and it is sworn that the place of service is "full five miles from any

part of the county" into which it is issued, that is sufficient to set aside the service, without an affidavit, that, at the place of service, there was not any dispute as to boundaries, and that it was not on the confines of the county in which the service took place. *Lloyd v. Smith*, 372

6. The Court will not set aside service of a *latitat* in *Middlesex*, without an affidavit that the service was not on the confines of the county, and that there was no dispute as to boundaries. *Thomson v. Burton*, 428

7. The service of process, in order to entitle the plaintiff to file common bail for the defendant, must be personal. *Thomson v. Pheny*, 441

PROCTOR.

If money is improperly in the hands of a proctor, the Consistory Court may order him to refund it. *Morris v. Gardner*, 524

PROHIBITION.

See COSTS, 42.—ECCLESIASTICAL JURISDICTION, 1.

PROMISSORY NOTE.

See ATTORNEY, 6.

PUBLIC DOCUMENT (PROOF OF).

See 6 *REG. GEN. H. T. 2 W. 4*, p. 199.

PUIS DARREIN CONTINUANCE.

A plea *puis darrein continuance* of the plaintiff's bankruptcy cannot be pleaded till the execution of the assignment to the assignees; and where the assignment was executed on the day of the last continuance in *banc*, and the defendant did not plead the plea till the assizes, the Court refused to set it aside, as it did not appear that the assignment was executed sufficiently early to allow the defendant to plead it on the last continuance day. *Bretherton v. Osborne*, 457

766 REJOIN (RULE TO).

QUARTER SESSIONS.

See ATTORNEY, 48.—MANDAMUS.—
SUBPENA, 1.

RECOVERY.

1. The acknowledgment of a warrant of attorney for suffering a recovery in *Wales* may be taken by an attorney of the Court of Great Sessions, although the tenant to the *præcipe* does not reside within the principality. *Davies*, demandant; *Dawkins*, tenant; *Evans*, vouchée, 206

2. A recovery may be amended by transposing the names of the demandant and tenant, although the deed to make a tenant to the *præcipe* was dated on the last day but one of the term in which the recovery was suffered. *Hamilton*, demandant; *Farrier*, tenant; *Wilson*, vouchée, 238

3. Where several vouchées appear personally at bar, and one by attorney, the names of the former need not be inserted in the *dedimus* or warrant of attorney. *Booty*, demandant; *Cameron*, tenant; *North and Wife*, *John Chalmers*, and *A. M. Chalmers*, vouchées, 241

4. If a recovery be suffered by the son of a peer, the Court will allow it to pass, although the acknowledgment is signed with his name of courtesy only, if he be described on the record as "commonly called Lord" &c. *Newark*, vouchée, 710

REFERENCE.

Where an agreement of reference is to be made a rule in the alternative of one of two Courts, and it is made a rule of one, it cannot be made a rule of the other. *Semble*, that under the 9 & 10 *Will.* 3, such an agreement in the alternative is illegal. *Winpenny v. Bates*, 559

REJOIN (RULE TO).

See 1 REG. GEN. H.T. 2 W. 4, p. 197.

SCIRE FACIAS.

RENDER.

1. The time for rendering a bankrupt will be enlarged by the Court, notwithstanding the provisions of the 11 *Geo.* 4 & 1 *Will.* 4, c. 70, s. 21, authorizing the render of defendants in discharge of bail to the county prison. *Harris v. Alcock*, 568

2. Where a defendant was sentenced to imprisonment for a libel, the Court enlarged the time for the bail to render him, till a week after his imprisonment expired. *Campbell v. Ackland*, 635

RETURN DAY.

1. It is no objection to a writ, that it is made returnable on the *Thursday* before and the *Wednesday* after *Easter-day*, when they fall in *Easter Term*. *Lilly v. Gompertz*, 376

2. The old process might have been made returnable on a day between the *Thursday* before and the *Wednesday* after *Easter-day*, when those days fell within *Easter Term*. *Hall v. Welchman*, 566

RIGHT (WRIT OF).

Upon the count in a writ of right, if the demandant omit to set forth his pedigree, the Court will not allow him to amend. *Worley v. Blunt*, 728

RULES (ENLARGEMENT OF).

See 1 REG. GEN. H.T. 2 W. 4, p. 196.

RULES (SERVICE OF).

See 1 REG. GEN. H.T. 2 W. 4, p. 193.

SCIRE FACIAS.

1. A *sci. fa.* should lie four juridical days in the Sheriff's office. *Fraser v. Miller*, 141

2. In all proceedings by *scire facias*, *Sunday* is not to be reckoned. *Anonymous*, 142

3. *Holy Thursday*, not being a juridical day, cannot be reckoned as

SEQUESTRATION.

one of the four clear days for a *sci. fa.* against bail to lie in the office. *Scott v. Larkins*, 202

4. The Court will not allow judgment to be signed for non-appearance to a *sci. fa.* against bail, unless it is shewn that the bail have been summoned, or that efforts, and what efforts, have been made to summon them. *Higgins v. Wilkes*, 447

5. In *sci. fa.* on a judgment more than a year old, if the writs of *sci. fa.*, which have been returned *nihil*, the award of execution, the *ca. sa.*, and the warrant, are issued in a different Christian name from the one stated in the judgment as that of the plaintiff, the Court will allow the proceedings to be amended by substituting the one stated in the judgment, although the *ca. sa.* has been executed and returned. *Thorpe v. Hook*, 501

6. Where several attempts were made to summon a defendant on a *sci. fa.*, returnable on the 28th April, and eight days had elapsed after the return of the writ; an application on the 5th November to sign judgment was held too late, without summoning the defendant again. *Wood v. Moseley*, 513

7. The rule 1 *H. T. 2 Will. 4*, s. 81, as to *sci. fa.*, applies to the case of both principal and bail. *Jackson v. Elam*, 515

8. Though two writs of *sci. fa.* on a judgment have been issued previously to the rule *H. T. 2 Will. 4*, which requires notice to be given to the bail, still judgment cannot be signed on such writs of *sci. fa.* without complying with that rule; and giving a rule for appearance is not sufficient. *Kennedy v. Lord Oxford*, 613

SECURITY FOR COSTS.

See Costs, 2, 5, 19, 25, 26, 29, 36, 44.
1 *REG. GEN. H. T. 2 W. 4*, p. 196.

SEQUESTRATION.

1. To a special *ca. utlag.* the she-

SESSIONS (SPECIAL). 767

riff returned an inquisition finding the defendant had benefices, but no lay fee; the Court awarded a writ of sequestration on reading the transcript of the outlawry and inquisition. *Rex v. Hind*, 286

2. A defendant has no right to have a writ of *levari facias de bonis ecclesiasticis* returned, but may have a return of the amount of profits received by the sequestrator. *Hart v. Vollans*, *Birnie v. Vollans*, *Gray v. Vollans*, 434

SERVICE OF PROCESS.

See PROCESS, 5, 6, 7.—*WAIVER*, 6.

1. To set aside an arrest in a wrong county, there must be an affidavit that it did not take place on the borders of the county, and that there is no dispute as to boundaries. *Webber v. Manning*, 24

2. Service of a summons on a peer, at his residence, when he is absent in France, is sufficient. *Anonymous*, 81

3. What is equivalent to personal service. *Rhodes v. Innes*, 215

4. The service of process must be personal, and no difficulty in effecting personal service will dispense with it. *Digby v. Thomson*, 363

Service of process on a newspaper proprietor at the place of abode given at the Stamp Office, according to the 38 *Geo. 3*, c. 78, s. 2, is not sufficient without personal service. *Ibid.*

5. What will be circumstances sufficient to dispense with personal service of a rule. *Englehart v. Morgan*, 422

6. Special service of rule. *Stout v. Smith*, 506

SESSIONS (SPECIAL).

1. Where an order for altering the arrangement of the parishes, townships, &c. of any county, for the convenience of holding special sessions, has been made under the 9 *Geo. 4*, c. 43, ss. 2 and 4, there is no appeal

against it: ss. 8 and 9 of that act applying to orders made under the authority of s. 7 only. *Rex v. The Justices of Derbyshire*, 386

SET-OFF.

See 1 REG. GEN. H. T. & W. 4, p. 196.

Where there are cross demands between the plaintiff and defendant, the plaintiff need not in the first instance prove the whole of his account, but need only prove the balance which he claims; and if the defendant proves his set-off to a larger amount, the plaintiff may then prove other parts of his account, to exclude the defendant's set-off. *Williams v. Davis*, 647

SETTING OFF JUDGMENTS.

See ATTORNEY, 15, 45.

SETTING OFF COSTS.

See COSTS, 8, 14, 17, 18.

SHAM PLEA.

See PLEA, 5.

SIDE BAR RULE.

See 1 REG. GEN. H. T. & W. 4, p. 196.

SHERIFF.

See PONE, 1.—PROCESS, 2, 3.—INTERPLEADER.

1. An affidavit to set aside a regular attachment against the sheriff on payment of costs, must state that the application is made for the indemnity only, and at the expense of the sheriff. *Rex v. The Sheriff of Middlesex*, 419

2. Where the sheriff is ruled to bring in the body, he is bound to obey the rule, although the proceedings of the plaintiff may be stayed by an injunction obtained by the defendant. Under 5 Reg. Gen. H. T. & Will. 4, the plaintiff must declare conditionally if he can, in order to entitle him to have an attachment against

SMALL DEB TOR.

the sheriff to stand as a security. *Rex v. The Sheriff of Middlesex*, 454

SHERIFF'S RETURN.

By the sheriff's return of "*languidus*," the illness of the defendant at the return of the writ should appear. *Perkins v. Meacher*, 21

SLANDER.

See COSTS, 39.

SMALL DEBTOR.

1. A defendant in custody on an attachment for non-payment of costs under 20*l.* more than twelve months, is not entitled to his discharge under the 48 Geo. 3, c. 123. *Doe d. Upton v. Benson*, 15

2. Where a defendant had given a warrant of attorney for debt and costs, to an amount exceeding 20*l.*, though the original debt was less, and had remained in execution for that amount twelve successive calendar months:—*Held*, not entitled to his discharge under the 48 Geo. 3, c. 123. — *v. White*, 19

3. The Court will discharge a debtor who has lain in prison for the space of twelve successive calendar months for a debt not exceeding 20*l.*, under the 48 Geo. 3, c. 123, s. 1, although he has been brought up under the compulsory clauses of the Lords' act, and has refused to deliver in his schedule. *Ex parte White*, 66

4. A defendant remaining in execution twelve successive calendar months, for the nominal damages in ejectment, is entitled to his discharge under the 48 Geo. 3, c. 123, s. 1, although the property recovered in the action is of considerable value. *Doe v. —*, 69

5. Where an application to discharge a debtor out of custody, under the 48 Geo. 3, c. 123, is successfully opposed on notice, no costs are allowed. *Anonymous*, 148

6. Where a defendant has been

STOLEN BILL.

charged in execution on the 26th November, 1830, for a debt not exceeding 20*l.*, and has continued in prison until the 25th November following, he is entitled to his discharge under the 48 Geo. 3, c.123, on that day. *Anonymous*, 150

7. On applying to discharge a prisoner under the 48 Geo. 3, c.123, the name of the cause stated in the notice must correspond with the name of that in which he is in execution. *Kelly v. Dickinson*, 537

8. Where a prisoner applies for his discharge under the 48 Geo. 3, c.123, his notice must be served on the plaintiff, and therefore, service on his attorney is not sufficient. The application must be made to the Court in term time, and cannot be disposed of at chambers. *Kelly v. Dickinson*, 546

9. Where a plaintiff's residence cannot be found, the defendant, who applies for relief under 48 Geo. 3, c.123, may serve the notice required by that statute on the plaintiff's attorney. *Wilson v. Mokler*, 549

10. A prisoner, who has been in custody for twelve months for a debt or for damages not exceeding 20*l.*, is entitled to his discharge absolutely as a matter of right. *Stacey v. Fieldsend*, 709

SOLICITOR.

1. A solicitor of the Court of Chancery, who has not been admitted on the equity side of the *Exchequer*, may practise there in the name of a sworn clerk of the Remembrancer's office, and is entitled to his fees. *The Attorney-General on the relation of Crupper v. Malin*, 576

STOLEN BILL.

Where a bill of exchange has been stolen, the Court will grant a rule to refer it to the Master to compute principal and interest, notwithstanding.

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ing the loss of the bill. *Allen v. Miller*, 420

SUBPOENA.

See Costs, 31.

1. In order to obtain an attachment for disobedience to a *subpoena*, requiring the attendance of a witness at the Quarter Sessions, the original *subpoena* must be shewn at the time of serving a copy. *Rex v. Wood*, 509

2. Difficulty in serving a subpoena will not dispense with the necessity of personal service, unless it is sworn that the person keeps out of the way to avoid personal service. *Barnes v. Williams*, 613

3. An attachment will not be granted against a witness for not obeying a subpoena, unless the original subpoena has been shewn, or if the witness has a reasonable ground for believing that he will not be wanted. *The King v. Sloman*, 618

SUMMONS.

See UNIFORMITY OF PROCESS ACT, 3.

SUNDAY.

See SCIRE FACIAS, 2.—8 REG. GEN. H. T. 2 W. 4, p. 200.—TERM, 1.

SUPERSEDEAS.

See 1 REG. GEN. H. T. 2 W. 4, p. 194.

SURVIVOR.

See WARRANT OF ATTORNEY, 1, 4, 7, 8.

TENDER.

1. If a defendant offers to pay part of a debt which the plaintiff refuses to accept, and the defendant then pays the money into Court, and the plaintiff takes it out, the defendant is entitled to costs from the time of the offer. *Marryott v. Clapp*, 701

EEE

TERM.

See ATTORNEY 38—SMALL DEBTOR 8.

1. By the operation of 1 *Will.* 4, c. 3, s. 1, on the 11 *Geo.* 4, c. 70, s. 6, the first day of *Trinity* Term is the 22nd of *May*, even though that day of the month falls on a *Sunday*. Consequently the *essoign* day, by s. 2, is on the 19th of *May*. *Doe v. Roe*, 63

2. A judgment signed on a warrant of attorney between the *essoign* day and the first day in full term, of the term subsequent to the death of the defendant, is regular; the three days previous to the day provided by 11 *Geo.* 4 & 1 *Will.* 4, c. 70, s. 6, for the commencement of the term being now no part of the term. *Price v. Hughes*, 448

TESTE OF WRIT.

1. Where a *ca. sa.* is issued in the course of a term, tested in the name of a chief justice who was dead at the time of issuing the writ, but alive on the first day of the term, the Court will not inquire into the exact day of issuing the writ, but will consider it regular, as on the face of it the teste is proper. *Sutton v. Lord Cardross*, 511

TIME (COMPUTATION OF).

See 8 REG. GEN. H. T. 2 W. 4, p. 200.
—SMALL DEBTOR, 6.

TRIAL.

See NEW TRIAL.—1 REG. GEN. H. T. 2 W. 4, pp. 190, 191.

TRUSTEES.

1. The assignee of an insolvent debtor cannot bring an action for rent against the tenant of premises in which the insolvent has a life interest, in the names of the trustees of those premises, without their consent, or the offer to them of a sufficient indemnity against costs. *Spicer v. Todd*, 306

VARIANCE.

The Court may rescind a judge's order, though not made a rule of Court. *Ibid.*

UNIFORMITY OF PROCESS ACT.

See DISTRINGAS.—REG. GEN. M. T. 3 W. 4, p. 470.

1. In order to get a *distringas* under the 2 *Will.* 4, c. 39, there must be three attempts to serve, and the summons left, or a positive affidavit that the defendant keeps out of the way to avoid being served. *Anonymous*, 513

2. The Uniformity of Process Act, 2 *Will.* 4, c. 39, applies to the commencement of actions only, and not to the continuance of actions commenced before the act came into operation. *Storr v. Bowles*, 516

3. In a summons, if the name of the plaintiff is omitted as the person who will enter an appearance for the defendant if he omit to enter one, it is an irregularity. *Smith v. Crump*, 519

4. Where the sheriff has distrained on a defendant's goods under the 2 & 3 *Will.* 4, c. 39, s. 3, and the defendant does not appear according to the exigency of the writ, the plaintiff may enter an appearance for him without leave of the Court. *Johnson v. Smealey*, 526

VARIANCE.

See AFFIDAVIT OF DEBT, 13.—SMALL DEBTOR, 7.

1. Where the affidavit of debt and writ stated the debt to be due to the plaintiffs, "executors of," and not "as executors of," and the declaration stated it to be due to them in their own right:—*Held*, no variance. —Executors, v. —, 97

2. Where a defendant has been arrested for goods sold and delivered,

VARIANCE.

and money lent and advanced, though the declaration contains no count for goods sold and delivered, the Court will not enter an *exoneretur* on the bail piece. *Gray v. Harvey*, 114

3. After the lapse of seven years, it is too late to take the objection, that a rule for a *sci. fa.* on a judgment more than ten years old has not been obtained. *Wilson v. Bacon*, 118

Though a judgment is against several, a *hab. corp. ad. satisf.* ought only to be issued against those who are in custody. *Ibid.*

4. If a defendant consents that a plaintiff shall have judgment as of a term previous to the trial, in proceeding against the bail the *ca. sa.* may be tested as of that previous term. *Hovenden v. Cranther*, 170

5. Notice of declaration in *case*, where the declaration filed is in *debt*, is irregular. *Cooke v. Johnson*, 247

6. The Court allowed a recovery suffered in 1780 to be amended by the insertion of three-fifths of *five* messuages instead of *one*, to make it conform with the deed. *Hind*, demandant; *Radden*, tenant; *Hawkins*, vouchee, 269

7. When process is general, and the affidavit of debt is made by the plaintiff as executor, it is no variance. *Ilsey v. Ilsey*, 310

8. A variance between the description of the form of action stated in the notice of the declaration, and the declaration itself, is an irregularity, but it is waived by the defendant taking the declaration out of the office. *Robins v. Richards*, 378

9. Where there is a variance in the description of the form of action between the note of allowance of a writ of error and the record, the plaintiff may sue out execution notwithstanding the writ. *Hills v. Spilsbury*, 421

10. A note of the allowance of a writ of error is no stay of the plain-

VENUE.

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tiff's proceedings, if it mis-describe the form of action. *Green v. Okill*, 422

11. The plea of "not guilty" in an action of *assumpsit* cannot be treated as a nullity. *Ivemy v. Farrant*, 453

12. Affidavits entitled in a cause, without giving the plaintiff the addition of "assignee," cannot be used in a cause where the plaintiff sues as assignee. *Wright v. Hunt*, 457

13. A writ of summons being, to answer the plaintiff "in an action of trespass on the case," followed by a declaration in *assumpsit*, is irregular, and may be set aside. *King v. Skiffington*, 686

14. If a plaintiff declares as executor on general process, the bail are discharged. *Manesty v. Stevens*, 711

VENIRE DE NOVO.

See Costs, 23.

VENUE.

See 1 REG. GEN. H. T. 2 W. 4, p. 197.

1. Where a new trial is directed in an action on a policy of insurance, the Court will not change the venue from *Dorsetshire to London*, on the ground that the plaintiff and defendant resided in *London*, and all the witnesses on the first trial were taken down from *London*. *Palmer v. Marshall*, 256

2. In an action upon an I. O. U. the venue may be changed upon the usual affidavit. *Roberts v. Wright*, 294

3. After an order for time to plead, "on the usual terms," either in town or country causes, the defendant cannot change the venue, whether the trial will be delayed or not by such a change. *Notts v. Curtis*, 319

4. Although a promissory note is not made payable to order, the Court will not grant a rule to change the

venue on the common affidavit. *Smith v. Elkins*, 426

5. In an action for a libel, where the venue is laid in one county, and removed, on the common affidavit, into another, the Court will move it back on an affidavit stating that the newspaper in which the libel appeared is published as much in one county as the other. *Hobart v. Wilkins*,

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6. In covenant, in order to entitle a defendant to change the venue, upon the ground that the witnesses on both sides reside in the county into which it is sought to change the venue, it must be sworn that it will be necessary for him to call witnesses in his defence. *Crompton v. Stewart*, 567

7. In an action on a policy of insurance, where the question to be decided required the opinions of medical men of skill, the Court would not change the venue to another county, though all the witnesses as to facts resided there, except upon certain terms. *Bowring v. Bignold*, 685

It is in the discretion of the Court whether they will allow the venue to be changed after an order for time to plead on terms. *Ibid.*

VOLUNTARY PAYMENT.

See WAIVER, 2.

WAIVER.

See ATTACHMENT, 1.—IMPARLANCE, 1, 3.—VARIANCE, 8.

1. Asking for time by a defendant does not waive an irregularity in the plaintiff's last proceeding. *Anonymous*, 23

2. If a plea in abatement be a nullity, no act of the plaintiff, apparently acquiescing in it, will be construed into a recognition of it. *Garratt v. Hooper*, 28

If money be paid after judgment

WARRANT OF ATTORNEY.

signed, it cannot be considered as a voluntary payment. *Ibid.*

3. Where a plaintiff, on account of negotiations between himself and the defendant, delays for a term his proceedings against the sheriff, the latter is discharged by the plaintiff's laches. *The King v. The Sheriff of Middlesex, in the case of Davis v. Allen*, 53

4. The Court refused to set aside a plea of judgment recovered on affidavit of its being totally false, though there did not remain time for the plaintiff to get judgment in the term, he having neglected to take the regular steps for that purpose in the earlier part of the term. *Poole v. Salter*, 297

5. Where a cause is removed from an inferior jurisdiction by *habeas corpus*, and the plaintiff declares conditionally before special bail perfected, and indorses a demand of plea on his declaration, according to rule 43, 1 *Reg. Gen. H. T. 2 Will. 4*, special bail is waived. *Law v. Stevens*, 425

6. If a party against whom a rule is granted, obtains its enlargement, he cannot afterwards object that it was not personally served. *Cartwright v. Blackworth*, 489

7. Where a defendant is entitled to an imparlance, which he obtains, he does not thereby waive his right to demur. *Pim v. Woodman*, 560

8. After the time for putting in bail above has elapsed, it is too late to object to the affidavit of debt. *Tucker v. Colegate*, 574

9. If an imperfect copy of a rule is served, the party served must appear to it, and by such appearance he does not admit that he is properly brought into Court, so as to prevent him from taking the objection to the form of the copy of the rule. *Wood v. Critchfield*, 587

10. Where a plaintiff had declared conditionally after the time for the

defendant's appearing had expired, and the defendant took the declaration out of the office:—*Held*, a waiver of the irregularity. *Gilbert v. Kirkland*, 153

WARRANT OF ATTORNEY.

1. Where a warrant of attorney authorizes a person to enter up judgment against the defendant, and the defeazance states, that the warrant is given to secure payment to that person, his heirs, &c., judgment cannot be entered up on it by his executrix, as it only authorized the testator himself to enter up judgment. *Henshall v. Matthen*, 217

2. In order to enter up judgment on an old warrant of attorney, it is not sufficient that the subscribing witness should sign the affidavit of execution in the character of the commissioner before whom it was sworn, but he must make affidavit also. *Field v. Bearcroft*, 308

3. A letter dated within the term, from a defendant, is sufficient proof that he is alive, so as to authorize judgment on an old warrant of attorney. *Sanders v. Jones*, 367

4. On a warrant of attorney to confess judgment to two, judgment may be entered up in favour of a survivor. *Johnson v. Jenkins*, 367

5. Where a warrant of attorney makes no mention of interest on the principal, but the defeazance does, the Court will allow execution to be issued for the principal and interest. *Shipton v. Shipton*, 518

6. Where a party gives a warrant of attorney to another, without consideration, in order that the latter may protect the goods of the former from execution, and judgment and execution are signed and issued against good faith, a Court of law will not interfere. *Dukes v. Saunders*, 522

7. Where a warrant of attorney only authorizes judgment to be entered up at the suit of the plaintiff, without mentioning executors, administrators, &c., the Court will not allow judgment to be entered up at the suit of the plaintiff's executor, although such representatives are mentioned in the defeazance. *Manvill v. Manvill*, 544

8. Where a warrant of attorney is given to three for a joint debt due to them, and no mention is made either in the warrant or defeazance of survivors, judgment, however, may be entered up at the suit of the survivors. *Build v. Wightman*, 545

WRIT (RETURN OF).

See REG. GEN. H. T. 3 W. 4, p. 731.

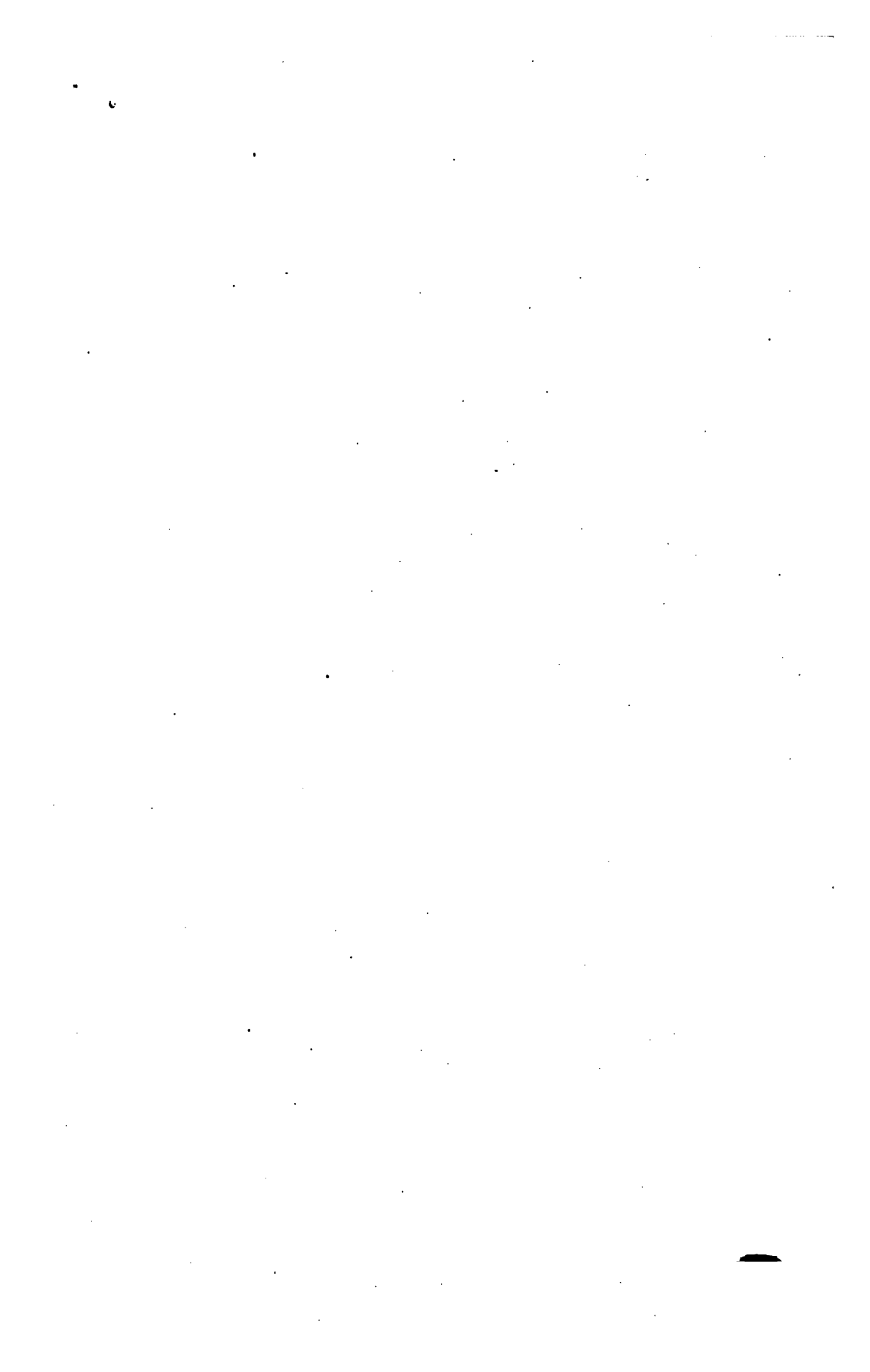
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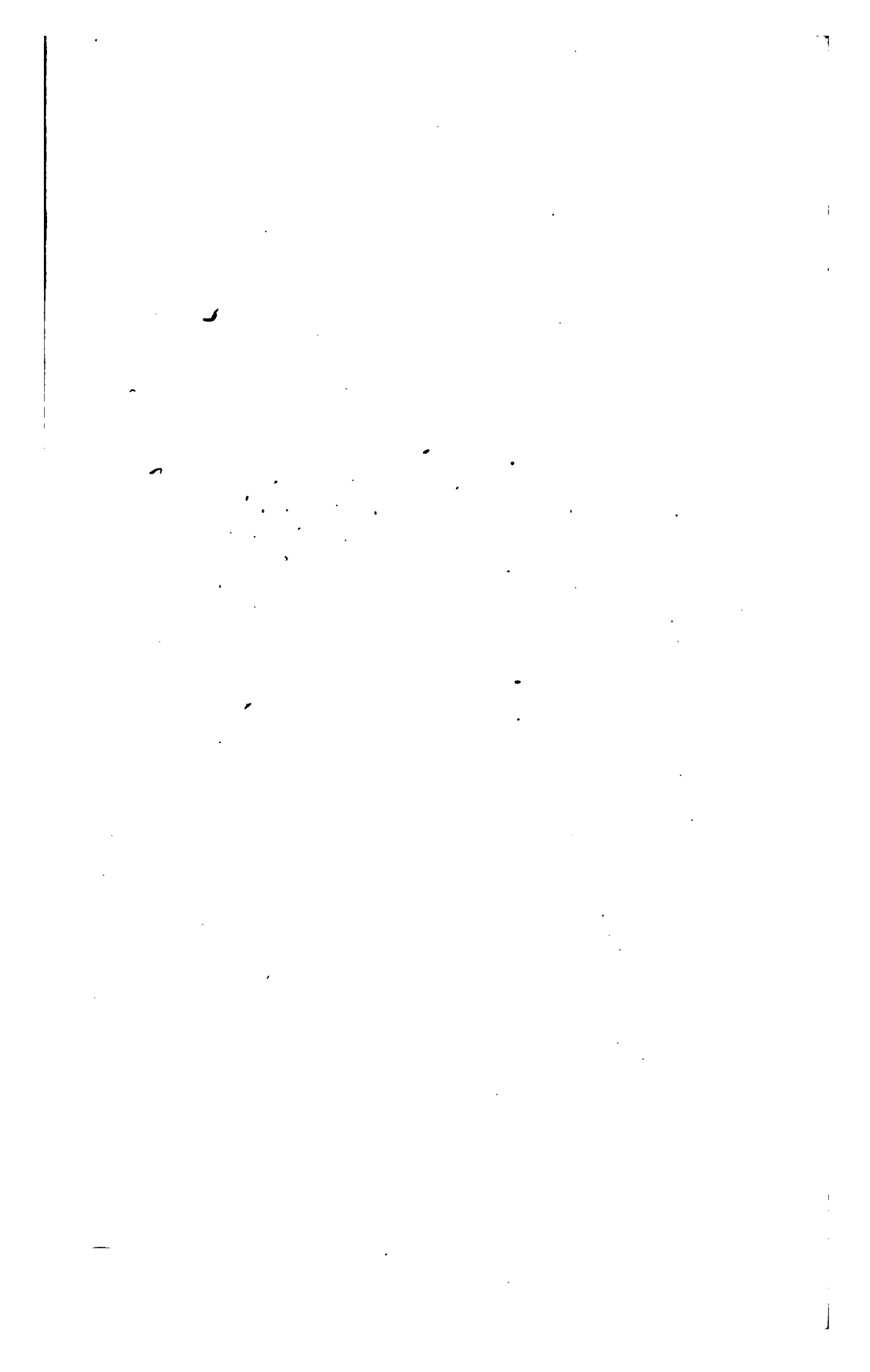
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